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Permanent Downloads and the Resale of Digital Content: Another Exhausting Journey?

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Abstract *The rise of digitally supplied content has created several ambiguities regarding the treatment of such content as goods or services. The shift in the medium of delivery from physical objects to digital formats has raised several questions in the realm of copyright law. The concepts of exhaustion and first sale, the interpretation of which in the Indian context is already arguably confused, now face additional uncertainties and ambiguities. This paper seeks to identify questions that arise in the field of copyright law due to the emergence of this new medium of delivery, such as whether the circulation of digital content constitutes 'distribution' or 'communication to the public', fair dealing rights associated with such delivery, and other contractual, legal and technology related issues. This paper attempts to answer these questions, relying on both international and Indian sources. In doing so, this paper analyses case law of the EU and USA, to discover the varying positions with respect to digitally supplied content for permanent download and the application of the first sale doctrine and exhaustion, and the resultant implications. This paper also examines the Indian position, against the backdrop of the 2012 Amendment to the Indian Copyright Act, 1957 and a recent Bombay High Court judgment.*

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I. Introduction

Earlier, digital formats, books, movies, songs etc. were supplied on physical media which easily fit within the definition of 'goods' – tangible, movable and marketable objects. This characterisation also enabled purchasers to acquire ownership over physical copies that were lawfully purchased. Consequently, the purchaser could control the onward distribution of the copy which in turn led to the creation of second-hand markets.

Today, however, digital formats distributed over computer networks (digital content) have profoundly impacted the state of affairs and have rendered physical media on which works were fixed, such as printed books, CDs and DVDs, unnecessary. The dematerialisation of information goods has obscured their character and, in some instances, has caused a seismic shift in their identity - from goods to services. This change in identity has also challenged traditionally well-founded concepts of ownership of goods. Consumers of such digitally supplied content have, to a large extent, lost control over the copies consumed. Even so, the demand for information goods, in their dematerialised form, has been on the rise for over a decade.

This perceived shift in identity has led to debates on the appropriate classification of digital content – a good or a service? Such debates have also been recently covered by the mainstream media in India.[1] These debates throw light on the fact that market dynamics in the virtual world are different from that of the material world. Unlike physical copies, digital copies do not deteriorate with use, are perfect substitutes and can be copied and transferred instantaneously (unless they are locked, which is not infrequent now). This difference raises several questions. Is digitally supplied content property? If so, should the buyers/users of such property have any ownership claims? Does the creation of a parallel virtual market of 'used' digital content affect

[1] Rahul Matthan, 'Let's Update the Notion of Ownership to the Digital Age' *Livemint* (11 February 2020) <https://www.livemint.com/opinion/columns/let-s-update-the-notion-of-ownership-to-the-digital-age-11581443947257.html> accessed 14 April 2020; Darsan Guruvayurappan, 'Digital Purchases: Act before it's too Late' *Deccan Herald* (27 January 2020) <https://www.deccanherald.com/opinion/panorama/digital-purchases-act-before-it-is-too-late-798415.html> accessed 14 April 2020.

the reward to right holders? Is the possibility of increased piracy a consideration to be taken into account? To a large extent, the answers to each of these questions depend on the mode of delivery of digital content, such as online streaming, subscription-based access or permanent downloads. This paper primarily examines one of these modes of content delivery - digital content available for permanent download. The online streaming and subscription-based models are also briefly discussed. The aim of this paper is to discover the Indian treatment of permanent downloads, compare it to international treatment and to draw the attention of policy makers to critical legal questions that remain unanswered.

Deciding whether to treat digital content available for permanent download as a sale of goods or a provision of a service can have far reaching economic, social, and cultural implications. The decision could either expand the Indian market by creating a secondary market for lawful copies of digital content, if such content is treated as goods, or restrict the market by classifying such content as services. However, such a decision could also either expand or restrict foreign investment, as arguably, digital services are treated more liberally than goods under the present foreign exchange regime. The purpose of the paper is not to provide answers or to take a side but only to highlight to policy makers that a clear position on this issue is required not only from an access to information perspective but also from a foreign trade perspective.

Part II of this paper will distinguish between the exclusive rights of the copyright holder – reproduction, distribution and communication to the public, and explain the concept of exhaustion of rights. Part III will analyse two recent decisions of the European Court of Justice, which have classified the supply of digital content, in one instance, as an exercise of the right to distribution, and in another instance, as an exercise of the right of communication to the public. This part will also deal with the implications of such a classification, and examine the position with respect to digitally supplied content (for permanent download) under the Indian Copyright Act, 1957 against the background of the 2012 copyright amendments and a recent Bombay High Court judgment in *Tips Industries v Wynk Music*.

II. Exclusive Rights

A. The Copyright Act ("Copyright Act")

i. The exclusive rights of reproduction, distribution and communication to the public

The Copyright Act, 1957 ("**Copyright Act**") vests copyright owners with specific exclusive rights which include the rights of reproduction, distribution and communication to the public.[2]

The exclusive right of reproduction permits the copyright owner to make copies of the original work. The exclusive right of distribution/sale allows owners to control the sale of original/copies of original copyrighted works that are not already in circulation i.e. copies that have not already been sold.[3] The exclusive right to communicate to the public allows owners to make a work or performance available for being seen or heard or otherwise enjoyed by the public, without issuing physical copies, by any means of display or diffusion, to be enjoyed individually or simultaneously.[4] For example, airing of a song on the radio, or the screening of a movie in a movie theatre, are exclusive rights of 'communicating to the public'.

ii. The doctrine of first sale and exhaustion

The exclusive right of distribution, however, is subject to exhaustion.[5] In the material world, the copyright owner has the exclusive right to sell a copy of a book, music or movie CD to a purchaser. After the first sale, the purchaser acquires ownership over that copy. Consequently, the purchaser has the right to control the onward distribution of that copy and can resell, distribute, gift, transfer that copy. The copyright owner therefore loses control over distribution of a copy of a work after its first lawful sale and the exclusive right of distribution is exhausted on the first lawful sale. The first sale doctrine assures the copyright owner an opportunity to realise the full value of each copy while ensuring that the copyright owner does not realise the value of each copy more than once.[6] The doctrine of exhaustion is therefore a sig-

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2 The Copyright Act 1957, s 14.

3 The Copyright Act 1957, ss 14(a)(ii), 14(b)(ii), 14(c)(iii), 14(d)(ii) and 14(e)(ii).

4 The Copyright Act 1957, s 2(ff).

5 The Copyright Act 1957, s 14(a)(ii); The phrase '*not being copies already in circulation*' has been explained to mean "*a copy which has been sold once shall be deemed to be a copy already in circulation*"; *Warner Bros. Entertainment Inc. v Santosh VG* (2009) SCC OnLine Del 835 [58].

6 ibid [57]; *See also* Pranesh Prakash, 'Exhaustion: Imports, Exports and the Doctrine of First Sale in Indian Copyright Law' (2012) 5(4) NUJS Law Review 635 (Pranesh).

nificant right of purchasers of copyrighted works. This doctrine allows for the resale of copyrighted works and enables the creation of lawful parallel second-hand markets.

The exclusive right to communicate to the public, however, is not subject to the right of exhaustion. The copyright owner retains complete control over the work through this mode of delivery of content. There is no transfer of property rights to the consumer and the consumer is seen to be enjoying a service.

B. International treaties and the doctrine of exhaustion

Article 6 of the Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**") arguably leaves it to Member States to adopt territorial rules of their choice when it comes to exhaustion – whether the exhaustion would be national or international.[7]

While the TRIPS does not lay down a rule of exhaustion for content in the digital environment, this rule has been discussed at international forums after the TRIPS. The World Copyright Treaty, 1996 ("**WCT**") and the WIPO Performances and Phonograms Treaty, 1996 (both with effect from 2002 and collectively referred to as "**WIPO Internet Treaties**")[8] deal with the protection of works/performances in the digital environment. The purpose of the WIPO Treaties is to update the existing major copyright related treaties i.e. the Berne Convention and the Rome Convention, to respond to developments in technology and the market.[9] Among other inclusions, such as extending protection to computer programs, databases, inclusion of digital rights management, the WIPO Internet Treaties also deal with distribution rights and the right to communicate to the public.

With respect to the distribution rights of literary and artistic works, performances and phonographs, the Agreed Statements to the WIPO Internet Treaties limit this right exclusively to fixed copies that can be put into

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[7] Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Annexe IC to the Marrakesh Agreement Establishing the World Trade Organisation 1994, 1869 UNTS 299, arts 6, 28; Article 6 states 'For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'.

[8] World Intellectual Property Organisation Copyright Treaty, December 20, 1996, 2186 UNTS 121(WCT); World Intellectual Property Organisation Performances and Phonograms Treaty, December 20, 1996, 2186 UNTS 203 (WPPT).

[9] Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, 496 UNTS 43.

circulation as tangible objects.[10] Thus, both the exclusive right of distribution and the doctrine of exhaustion apply only to physical goods, and not to intangible digital content. This implies that resale of legally purchased digital content without authorisation from the copyright-holder is not permissible.

Even before India acceded to the WIPO Internet Treaties in 2018, the Indian legislature had already amended certain provisions of the Copyright Act in 2012 to bring them in line with the WIPO Internet Treaties. However, as discussed in the next section of this paper, the 2012 amendments do not completely align the Indian position with that of the WIPO Internet Treaties, especially with respect to distribution rights for digital formats.[11]

III. Permanent Downloads: Reproduction, Distribution and Communication to the Public

A. The USA and the European Union ("EU") and their examination of distribution of digital content for permanent downloads

The USA and the EU have had the opportunity to deal directly with issues relating to permanent downloads and resale in notable instances as examined below.

Given the generally harmonised nature of intellectual property rights laws, it is worth examining how the USA and EU, the most powerful voices in the intellectual property rights arena, have dealt with the problems surrounding copyrighted material delivered for permanent download.

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10 WCT, arts 6, 7; The agreed statement concerning Articles 6 and 7: *As used in these Articles, the expressions "copies" and "original and copies" being subject to the write of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects*; WPPT, Article 12; The agreed statement concerning Article 12: *As used in these Articles, the expressions "copies" and "original and copies" being subject to the write of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.*

11 Press Information Bureau, 'Cabinet approves accession to WIPO Copyright Treaty, 1996 and WIPO Performances and Phonograms Treaty, 1996' (4 July 2018) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=180389> accessed 15 April 2020; Rishabh Mohnot, 'Huge Win for Copyright Owners: India Signs up to Internet Copyright Treaties!' (*SpicyIP*, 6 July 2018) <https://spicyip.com/2018/07/huge-win-for-copyright-owners-india-signs-up-to-internet-copyright-treaties.html> accessed 19 April 2020.

i. USA

In *Vernor v Autodesk*,[12] the court was tasked with deciding whether the purchase and subsequent sale of used copies of Autodesk's software amounted to copyright infringement. The case required the court to assess whether Autodesk *sold* copies of its software to its customers or merely *licensed* the copies without a sale. If customers owned copies of the software then both the onward sale to Vernor and Vernor's subsequent sales would be non-infringing under the first sale doctrine. However, if Autodesk only granted a licence to the software, then sale of those copies would not be protected by the first sale doctrine and would therefore infringe Autodesk's exclusive distribution right. The court held that since the download of the software was subject to an express licence agreement (which was also limited in time), there was no sale of the software in the first place. The court held that even though the software was available for permanent download, the copyright holder had subjected the download to an express licence agreement and reserved all rights with respect to that copy of software. Therefore, resale was not permitted without authorisation from the copyright holder.

In the *Redigi* case,[13] the defendants had created an internet platform that was intended to enable the lawful resale of lawfully purchased digital music files. In order to facilitate this resale, the defendants hosted the files on the platform. The technology developed by Redigi was sophisticated. The technology first scanned the music file to check whether it was a lawful copy, then migrated the file from the user's computer to the platform. This ensured the user's copy was deleted.

While Redigi facilitated the second-hand sale of digitally acquired music files, however, this required files to be reproduced in the process.[14] As a result, the court held Redigi liable for infringement of copyright, as such reproduction was not protected by either the doctrine of first sale or fair use.

ii. EU

The WIPO Internet Treaties were ratified by the EU in 2009.[15] The EU has had the opportunity, in notable instances, to decide whether the supply of digital content for permanent download would amount to "distribution" or

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[12] *Vernor v Autodesk Inc.*, 621, F 3d 1102 (9th Cir 2010).

[13] *Capitol Records LLC v Redigi Inc.*, No. 16-2321 (2nd Cir 2018).

[14] ibid.

[15] European Commission, 'European Commission welcomes ratification of the WIPO Copyright Treaties' (14 December 2009) <https://ec.europa.eu/commission/presscorner/detail/en/IP_09_1916> accessed 19 April 2020.

"communication to the public". Even though the subject matter of both the decisions is covered by the WCT, there have been contrasting decisions in this regard.

With respect to software that is supplied for permanent download, in 2012, the Court of Justice of the European Union ("**CJEU**") in *UsedSoft GmbH v Oracle International Corpn.* ("**UsedSoft Decision**") held that such supply amounts to a sale of the software irrespective of the agreement being a licence agreement, since the licence permitted permanent and not time bound access to the software. Consequently, the court has held that a lawful permanent download of a software results in the exhaustion of the distribution right over that copy of software and onward resale was held to be lawful.[16] Further, reproduction of the software, to facilitate the second-hand sale and for use after the second-hand purchase, was not considered an infringement of the exclusive right of reproduction.[17] The court took a functional approach and observed that unlike other copyrighted material, software was necessarily required to be reproduced to be used. If such reproduction was not permitted, the exhaustion of the right of distribution would be meaningless.

The UsedSoft Decision was subsequently cited in *Aleksandrs Ranks v Microsoft*[18] for several propositions of law including the interpretation of sale for the purposes of the first sale doctrine. In this case, it was held that a lawful acquirer of a copy of a computer program, on a material medium, that is accompanied by an unlimited licence, can resell the copy to a new acquirer. However, the court held that back-up copies, on non-original medium, cannot be resold without the consent of the copyright holder under the first sale doctrine.

In contrast to the UsedSoft Decision, the CJEU did not extend the same treatment to information goods such as e-books which are covered by a different directive but also enacted to implement the WCT.[19] In 2019, in *Nederlands Uitgeversverbond v Tom Kabinet Internet BV*, ("**Tom Kabinet Decision**") the CJEU held that the supply of a book on a material medium and the supply of an e-book cannot be considered equivalent from an economic and functional point of view. It held that the supply of an e-book to

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[16] Judgment of 3 July 2012, *UsedSoft GmbH v Oracle International Corpn.* C-128/11, ECLI:EU:C:2012:407 2013 Bus LR 911 (UsedSoft) [48].

[17] ibid [88].

[18] *Aleksandrs Ranks v Microsoft*, C-166/15, 2016, 2017 Bus LR 290.

[19] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive).

the public by downloading, for permanent use, is covered by the concept of 'communication to the public' and not by the exclusive right of distribution, and their rights would not be exhausted.[20] While interpreting the exclusive right of distribution of original/lawful copies, the court referred to the Agreed Statements of the WCT - Articles 6 and 7.[21] According to these statements, the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental, refer exclusively to fixed copies that can be put into circulation as tangible objects. The court held that the exclusive right of distribution does not encompass distribution of intangible works such as electronic books.

At a policy level, the results of these decisions impact markets for software and other digital content differently. The UsedSoft Decision treats physical and digital mediums similarly and effectively creates a legal second-hand market for licensed software available for permanent download (except back-up copies), regardless of the terms of the licence agreement. This decision also attempts to curb free-riding by requiring persons reselling software to ensure that the software is rendered unusable pursuant to the resale. To achieve this, copyright holders may introduce technological measures to monitor digital copies. While this judgment is impactful in opening up the used software market, it is limited since it is targeted only at software available for permanent downloads and may not extend to software provided as managed services or contracts of service or licences that are limited in time.

On the other hand, the Tom Kabinet Decision and decisions in the USA foreclose the creation of a secondary market for used digital content. Treating e-books supplied for permanent downloads as a communication to the public effectively renders it as a service being provided by the copyright holder rather than a sale of a good. Such a treatment greatly benefits copyright holders, permits them to control distribution of such content and consequently reduces the scope for piracy. The market, on the other hand, is deprived of autonomy, is restricted and expansion is controlled.

B. Discovering the Indian position

There have been no court cases nor amendments to the Copyright Act addressing the issue of whether or not the resale of copyright protected material in digital formats is permitted in India. Indian courts have considered the rule

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20 ibid [49].

21 ibid [40], [45], [50], [51]; WCT, Agreed Statement concerning arts 6 and 7.

of exhaustion only in relation to physical objects such as books, DVDs.[22] The discussion below seeks to discover the Indian position, the implications of such a position and seeks to examine questions along with possible answers Indian courts or policy makers will have to address in such situations.

The Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010, ("**Standing Committee**") and the judiciary appear to have indirectly addressed this issue, though not completely.

i. Standing Committee's views

As discussed above, the Copyright Act was amended in 2012. One of the objects of the amendment was to align the Copyright Act with the WIPO Internet Treaties, to the extent necessary and desirable.[23] The report of the Standing Committee states that the definition of 'communication to the public' under the Copyright Act was amended to bring it in line with the WCT.[24] As it stands and as introduced before the Standing Committee, communication to the public means making any work or performance available to the public directly or by any means of display or diffusion, *other than by issuing physical copies of the work*, for enjoyment either individually or simultaneously.[25] This definition is aligned at least to the WCT i.e. limiting this definition to communication through digital formats.[26]

From the discussions of the Standing Committee, it appears that music companies were wary that the proposed amendment would be interpreted to mean that digital sales, such as the sale of a song through iTunes, would also fall within the definition of 'communication to the public'. They argued that such an interpretation would be wrong because digital sales are sales nonetheless, though on a different medium. Such sales should therefore not be covered within this definition.[27] The Standing Committee agreed and clarified that their reservations were unfounded since issuing physical copies or legitimate digital downloading of music or video recording by payment cannot be considered a communication to the public.[28]

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[22] *John Wiley & Sons Inc. v Prabhat Chander Kumar Jain* 2010 SCC OnLine Del 2000 : ILR (2010) 5 Del 510; *See also* Pranesh (n 5).

[23] The Copyright (Amendment) Act 2012, Statement of Objects and Reasons.

[24] Department-Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010 (23 November 2010) <https://www.prsindia.org/sites/default/files/bill_files/SCR_Copyright_Bill_2010.pdf > accessed 19 April 2020 (Standing Committee Report).

[25] The Copyright Act 1957, s 2(ff).

[26] Agreed Statements, WCT, art 8.

[27] Standing Committee Report, para 6.2.

[28] Standing Committee Report, para 6.3.

Though the definition of ‘communication to the public’ under the Copyright Act very clearly extends to issuance of digital copies, the Standing Committee’s report suggests that digital copies that are downloaded for payment will somehow not be covered within the ambit of ‘communication to the public’ in India. This indicates the intention of the Standing Committee to treat permanent digital downloads at par with the issuance of physical copies of works. Further, the Copyright Act was not amended to limit the right of distribution and consequently exhaustion, to tangible physical objects. This would imply that the right of distribution of works and consequently the doctrine of exhaustion would not be limited only to fixed tangible copies but also to digital downloads.

While the EU has taken a similar approach in the case of software, for other information goods such as e-books, the EU has gone the WCT way by treating physical and digital works differently and applying the rule of exhaustion only to physical copies.

ii. Single Bench Bombay High Court’s view in Tips Industries v. Wynk Music

A recent Bombay High Court judgment (single bench) has also followed the same view taken by the Standing Committee.[29] This case, however, was not concerned with the issue relating to the legality of resale of digital goods. The case was a copyright infringement case and was more important for its holding on statutory licensing. However, it throws light on the treatment of copyrighted content that is supplied by way of permanent downloads.

The defendant in this case provided songs to its customers through an online platform and mobile app. Customers could either (a) pay a one-time fee and download a song permanently, or (b) pay a subscription fee and listen to songs during the subscription period, or (c) stream songs and listen to them online.

The defendant was providing songs owned by the plaintiff without a valid licence. The plaintiff therefore instituted an action for copyright infringement of the sound recordings against the defendant. The Copyright Act grants the owner of a copyright in sound recordings, among other rights, the exclusive right to sell the sound recordings. In this regard, in order to establish infringement, the plaintiff was required to show that the defendants

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[29] *Tips Industries Ltd. v Wynk Music Ltd.* Notice of Motion (L) No. 197 of 2018, decided on 23-4-2019 (Bom) available at <https://www.medianama.com/wp-content/uploads/ordjud-2019-05-07T004008.448.pdf> accessed 6 June 2020 (This judgement has been appealed before a Division Bench of the Bombay High Court and a decision is pending).

continued to 'sell' the plaintiff's sound recordings without authorisation. The plaintiff was successful in establishing this with respect to the songs that were permanently downloaded by users for payment of a one-time fee. The factors that led the court to equate a permanent download for payment as a sale were the following: (a) sound recordings are permanently downloaded onto the customer's device; (b) the permanently downloaded copy could be accessed and enjoyed by the customer without the app; (c) such a copy could also be further copied and/or transferred without restrictions to other devices.[30] These factors led the court to hold that a permanent download of the plaintiff's song by customers from the defendant's platform amounted to a 'sale' of the sound recording. Since the 'sale' of a sound recording was the exclusive right of the plaintiff, without a valid license, the defendant's act of selling these songs amounted to copyright infringement.[31]

Further, the court referred to the observations of the Standing Committee, to hold that a permanent download for payment will not be covered within the ambit of 'communication to the public' in India and will instead constitute an act of distribution.[32] Just like the Standing Committee, the court failed to acknowledge that the definition of 'communication to the public' clearly extends to the issuance of digital copies of works. The interpretation of the court and the Standing Committee renders the amendment to this definition meaningless. As stated above, the plain language of the amendment excludes only the issuance of 'physical' copies from the ambit of the definition of 'communication to the public'. Further, the interpretation of the court and the Standing Committee equates physical copies with digital copies for permanent download, which was exactly what the WIPO Internet Treaties were trying to prevent. If indeed our Copyright Act was amended to bring it 'in line' with the WIPO Internet Treaties, such interpretations defeat the purpose of the very amendment. These statements therefore indicate that permanent digital downloads are to be treated at par with the issuance of physical copies of works in India.

iii. Implications of the Indian view, so far, and a host of unanswered questions

a. Copyright Act

From the above, it appears that the Indian view, so far, is that copyrighted material supplied through digital formats for permanent download could

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[30] ibid, [23].
[31] ibid.
[32] ibid, [44], [45].

qualify as a sale of a good. Taking this conclusion a step further would imply that, upon the first lawful sale of a copy of a digital good, the exclusive distribution right of the copyright holder over that copy is exhausted. It may therefore be possible to argue that digital exhaustion applies in India and resale of lawful digital copies is permissible in India.

However, the nuances of this resale right remain unclear – if the copy that has been downloaded is resold, and the process of resale requires the seller and acquirer to make copies to facilitate transmission and consumption, will the reproduction amount to infringement or will it be covered as fair dealing under Section 52 of the Copyright Act?[33]

The answer to this question is not straightforward. For instance, in the *Redigi* case decided in the USA, Redigi facilitated the second-hand sale of digitally acquired music files, however, this required files to be reproduced in the process.[34] As a result, the court held Redigi liable for infringement of copyright, as such reproduction was not protected by either the doctrine of first sale or fair use. In contrast, the UsedSoft Decision adopted a functional approach. As discussed above, this case was with respect to software, and held that the concept of exhaustion would be rendered meaningless if reproduction was not permitted in cases where lawful resale and consumption required reproduction.

In India, Section 52 of the Copyright Act lists out specific fair dealing/use rights of users. With respect to computer programs, users (lawful possessors) are permitted to make copies of a computer program in order to utilise the computer program for the purpose for which it was supplied.[35] Generally, this fair dealing right applies to the first lawful possessor. If permanently downloaded software is treated as a sale, the purchaser and subsequent lawful acquirers of that copy, being lawful possessors, can make copies of the software in order to utilise the software. Read this way, this fair dealing right reflects the reasoning of the UsedSoft Decision. Such copying may therefore not be considered as a violation of the exclusive right of reproduction.

With respect to other works, however, the position may be different. Section 52 permits transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.[36] A separate fair dealing right is provided for transient or incidental storage of a work or performance for providing electronic links,

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33 *See* also *Capitol Records LLC v Redigi Inc.*, No. 16-2321 (2nd Cir 2018).
34 ibid.
35 The Copyright Act 1957, s 52 (aa)(i).
36 The Copyright Act 1957, s 52 (b).

access or integration, and this right is subject to the copyright holder's consent and safe harbour provisions.[37] These provisions were introduced by the 2012 amendment and there was considerable opposition to these provisions before the Standing Committee.[38] The discussions highlighted the possibility of unauthorised copies being given a free hand.[39] Resale of authorised copies was not discussed. Reproduction of authorised copies, however, for the purpose of a lawful resale may fall within this fair dealing exception. This may be so if the storage is transient and solely done for the purpose facilitating a lawful resale. Such reproduction/storage may be argued to be incidental to the main purpose of facilitating a lawful resale. For example, a resale may require a copy of a work to be first removed from the reseller's device and then temporarily reproduced/stored on a cloud storage facility after which it is downloaded (and removed from the cloud storage facility) by the ultimate purchaser.

While it may be possible to defend the above position in theory, the actual practise of such resale rights depends largely on technical solutions. Practical problems of ensuring that a copy that is resold is actually a lawful copy and does not continue to reside with the seller after the sale, magnify in the digital context. Technical solutions such as locks and keys and monitoring tools may be used to ensure that copies that are resold are lawfully acquired copies and once resold will not reside with the seller. Technology is fast developing and it is possible that such monitoring tools may be implemented and used by copyright holders.[40] If such a possibility is real, e-commerce companies will benefit from operating and controlling resale platforms and consumers will benefit from increased choice, lower prices and more access. While the possibility of piracy cannot be ruled out, the degree of piracy with such technological tools will be considerably reduced.

Further, recognition of such resale rights would also require clarity on the rule of exhaustion that would be applied in the digital space i.e. national or international. Indian courts have had difficulty in grasping the concept of exhaustion with respect to the import and export of physical goods such as books and DVDs. This is seen through several case laws, which have either not taken into account the concept of exhaustion at all in their rulings,[41] or

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37 The Copyright Act 1957, s 52 (c).

38 Standing Committee Report, para19.3-19.7.

39 ibid.

40 David Streitfeld, 'Imagining a Swap Meet for E-Books and Music' *The New York Times* (March 7, 2013) <https://www.nytimes.com/2013/03/08/technology/revolution-in-the-resale-of-digital-books-and-music.html> accessed 13 July 2020.

41 *Eurokids International (P) Ltd. v India Book Distributers Egmont Books Ltd.* 2005 SCC OnLine Bom 905 : (2005) 6 Bom CR 198.

even while doing so, have wrongly applied it to the facts.[42] Contrary to these rulings, the Copyright Act clearly allows for an international exhaustion regime. This means that once a lawful copy of a work is sold anywhere in the world, the copyright owner's exclusive right over that copy is exhausted internationally. This allows purchasers to buy and sell such copies, import and export freely without jurisdictional control of the copyright owner. International exhaustion therefore allows for weaker territorial control by the copyright owner and greater freedom of trade. The Copyright Act protects both Indian and foreign works alike and grants the exclusive rights to 'issue copies of works not already in circulation' i.e. copies not already sold, to copyright owners both Indian and foreign.[43] Given that the Copyright Act affords protection to foreign owners/works in the same manner as Indian owners/works, both such owners/works are also subject to the same limitation i.e. the exclusive right to distribute copies is limited to copies that are not already in circulation (regardless of jurisdiction).[44] It is crucial for a country like India to clarify the existing lacuna in the law of exhaustion and follow an international exhaustion regime in order to ensure wider access to content and to be able to tap into the true benefits of an expansive marketplace like the internet.

Since these issues have not been explicitly considered, there also remains a possibility of courts adopting the approach agreed to in the WIPO Internet Treaties and classifying any digital supply of copyrighted material as a communication to the public and not as a right of distribution. Such a view will, however, run counter to the views of the Standing Committee and the Bombay High Court but the deviation will have to find support from the language of the Copyright Act, especially 'communication to the public'. Further, the facts of each case may result in a different end result. For instance, if a download of a copyrighted work was subject to an express licence agreement (especially if such a licence is limited in time), the copyright holder may argue that there was never a sale in the first place. A decision in the USA in *Vernor v Autodesk*[45] followed this reasoning. The court held that even though the software was available for permanent download, the copyright holder subjected the download to an express license agreement and reserved all rights with respect to that copy of software. Contrary to this position, the UsedSoft Decision looked beyond the mere words of the license agreement and categorised the download as a sale.

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[42] Pranesh (n 5).
[43] Pranesh (n 5); The Copyright Act 1957, ss 14, 40 and 41.
[44] ibid.
[45] *Vernor v Autodesk Inc.* 621, F 3d 1102 (9th Cir 2010).

b. Foreign direct investment

The implications of this classification as sale versus communication to the public also impact the treatment of foreign investment in e-commerce companies that are engaged in such activities.

It is arguable that the current foreign exchange regulations in India treat 'buying and selling of goods' over the internet more strictly as compared to the 'provision of services' over the internet. E-commerce is defined as the buying and selling of goods and services including digital products over digital and electronic networks.[46] Hundred per cent foreign investment is permitted for the sale of services through e-commerce under the automatic route (i.e. without government approval).[47] While hundred per cent foreign investment is permitted in e-commerce companies engaged in the buying and selling of goods, their activities are subject to restrictions. Such companies must ensure that they are either engaged only in business to business (B2B) activities (business to customer (B2C) i.e. retail trading is strictly regulated and is subject to foreign investment caps and as well as government approvals beyond certain caps); or they must operate as 'marketplaces.' A marketplace only facilitates transactions between buyers and sellers and companies engaged in providing the marketplace cannot own inventory.

The view of the Standing Committee and the Bombay High Court make it clear that a permanent download of a digital product would amount to a sale (in the absence of a limited licence agreement). Therefore, e-commerce companies that are foreign-owned or controlled that permit permanent download of digital goods such as music, books, etc. may be considered as engaging in the 'buying and selling of goods' and will have to comply with various FDI restrictions regarding B2C business.[48]

If, however, the provision of copyrighted content through digital formats is classified as a 'communication to the public' i.e. provision of a service where there is no transfer of ownership of goods, foreign investment in the e-commerce entity may be permitted to the maximum extent and through the automatic route with much lesser restrictions.

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[46] Foreign Exchange Management (Non-Debt) Rules 2019 (NDI Rules).
[47] ibid.
[48] ibid.

IV. Conclusion

The implications of ownership and resale rights in the virtual world are complicated and require focused consideration. Secondary markets contribute to the public good as they give consumers additional opportunities to purchase copyrighted works usually at prices below the retail price, allow consumers to continue to obtain copies of works after the owner has ceased distribution and allow the proliferation of businesses. At the same time, resale rights, especially in the digital scenario, come with an increased risk of piracy and possible devaluation of original content. Further, the classification of different modes of delivery of content has significant foreign exchange implications. While coming up with a solution, courts should create limited and special carve outs, ensure that the normal exploitation of the work is not hampered and rights of stakeholders are not unreasonably prejudiced.

Technology and the widespread reach of the internet may slowly render permanent downloads unnecessary. Even so, the concept of downloads is not completely extinct. The existing lacuna in law on this subject should be resolved to ensure that the digital supply of content – be it in the form of content required to be permanently downloaded or streamed online – is not riddled with ambiguities and uncertainties. Clarity on the treatment of such supply of content is desirable for everyone – users, businesses and the economy as a whole.

The Interaction between Competition Law & Digital and E-commerce Markets in India

*Anshuman Sakle and Nandini Pahari**

I. Introduction: Developments in the Digital and E-commerce Domains in India

The recent tiff between Amazon and Walmart-owned Flipkart on one hand and the Competition Commission of India (**CCI**) on the other, has been making headlines for the last couple of months. While the CCI directed the Director General (**DG**) to conduct a probe against the exclusive practices of these two popular e-retailers under Section 26(1) of the Competition Act, 2002 (as amended) (**Act**),[1] the Hon'ble High Court of Karnataka (**Karnataka High Court**) stayed the investigations.[2] First Amazon and then Flipkart

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1 S 26(1) Order in *Delhi Vyapar Mahasangh v Flipkart Internet (P) Ltd* 2020 SCC OnLine CCI 3.

2 Stay order of the Karnataka High Court, available at <https://tech.economictimes.indiatimes.com/news/internet/karnataka-high-court-grants-stay-on-ccis-probe-for-eight-weeks/74136975> accessed 12 May 2020.

approached the Karnataka High Court to stay the investigation by the DG on grounds that the CCI did not have sufficient evidence to form a *prima facie* case against them.[3] In the backdrop of the rising popularity of the digital marketing sector and e-commerce platforms, it is yet to be seen how the CCI manages to regulate the behaviour of such companies above all the administrative and legislative hurdles existing in India.

It is a fact that both digital marketing and e-commerce markets have seen exponential growth in the recent past. The growth in this industry has been triggered by increasing internet and smartphone penetration. The Indian e-commerce sector's revenue is expected to jump from USD 39 billion in 2017 to USD 200 billion in 2026, growing at an annual rate of 51%, which is the highest in the world.[4]

Initially the e-commerce sector was looked at as an extension of the prevailing brick and mortar stores and as an efficient mode of distribution of the products of such stores and not as a separate 'online market'. The rise in the popularity of the e-commerce sector gradually increased the volume of business to business and business to consumer transactions. This increased the interaction and dependence of the distributors and vendors upon e-commerce platforms, further amounting to vertical restraints being imposed by such e-commerce platforms upon such distributors and vendors in the form of various kinds of exclusivity restrictions.[5] An array of past decisions of the CCI in relation to the e-commerce sector dealt with vertical restraint cases like minimum "Resale Price Maintenance" (**RPM**) or fixed pricing policies and non-price restraints like exclusive distribution network or other kinds of exclusive agreements. However, post the order of the CCI in *Rubtub Solutions (P) Ltd.* v. *MakeMyTrip India (P) Ltd.*[6] (**the MakeMyTrip case**), the realization that e-commerce platforms were distinct from regular markets pushed the CCI to take note of the other types of novel competition concerns like "Across Platforms Parity Agreements" (**APPA**) , retail "Most Favoured Nation" (**MFN**) clauses, "geo-blocking" or "geo-filtering" and advertising restrictions, that were specific to e-commerce market-places.[7]

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3 Available at <https://thetechportal.com/2020/02/28/flipkart-cci-investigation-karnataka-high-court-stay/> accessed 12 May 2020.

4 Available at <https://www.ibef.org/industry/ecommerce.aspx> accessed 12 May 2020.

5 Cyril Amarchand Mangaldas, 'Vertical Restraints in the Indian E-Commerce Sector: The New-Age Competition Issues', (*SCC Online Blog*, 2019) PL (Comp L) August 73, <https://www.scconline.com/blog/post/2019/08/08/vertical-restraints-in-the-indian-e-commerce-sector-the-new-age-competition-issues/> accessed 12 May 2020.

6 Case No. 1 of 2020, decided on 24-2-2020 (CCI).

7 ibid.

Further, in line with the international best practices, on 8 January 2020, the CCI released a report to identify impediments to competition due to the emergence of e-commerce markets in India and to ascertain the CCI's enforcement and advocacy priorities in light of the same (**E-commerce Report**).[8] Such initiatives demonstrate that the CCI looks into the conduct of e-commerce players despite their unconventional and complex business models and regulates related competition law concerns. However, a pertinent question that remains to be answered here is whether the CCI is currently equipped to deal with such peculiar issues in such a fluid and fast-growing market like e-commerce in India. If yes, how will the CCI proceed in dealing with the competition law concerns raised by the e-commerce platforms?

In light of the above, ***Part I*** of this article deals with the present regulatory framework under the Act within the ambit of which anti-competitive practices of e-commerce platforms are currently being investigated by the CCI. ***Part II*** of the article provides a brief snapshot of how the CCI has dealt with the anti-competitive practices of e-commerce platforms in the past and how these decisions and observations gradually led to the realization that such platforms are unique and different from the existing offline or brick and mortar market-places. ***Part III*** of the article deals with the various kinds of anti-competitive practices (including the novel types of anti-competitive arrangements) that the e-commerce sector may be prone to due to its distinct business model and whether the present scope of the Act is sufficient to deal with such practices. ***Part IV*** throws some light upon the defenses that the CCI has considered while investigating into the practices of the e-commerce platforms and demonstrates why the CCI adopted a 'rule of reason' or a flexible approach while adjudicating such cases. ***Part V*** of the article deals with an important initiative undertaken by the CCI in the form of the E-commerce Report to understand the scope of such markets appropriately and be well-equipped to investigate any anti-competitive practices of such platforms. ***Part VI*** discusses how other jurisdictions are dealing with similar issues and the measures adopted by them. The conclusion highlights the major takeaway points of what the authors feel about the adequacy of the steps undertaken by the CCI in dealing with the anti-competitive practices of the e-commerce platforms and the way forward in this regard.

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8 Competition Commission of India, *Market Study on E-Commerce in India: Key Findings and Observations* (released on 8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 12 May 2020.

II. Regulatory Framework for Dealing with Competition Law Concerns in the E-Commerce Sector

A. Section 3(4) of the Act (Vertical restraints)

The CCI has the power to scrutinize any agreement pertaining to the e-commerce sector that leads to an "Appreciable Adverse Effect on Competition" (**AAEC**) under Section 3 of the Act, which lays down the framework for regulating anti-competitive agreements, including vertical restraints. Section 3(4) of the Act specifically deals with vertical restraints and states that:

> *"Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade-in goods or provision of services, including—*
>
> (*a*) *tie-in arrangement;*
>
> (*b*) *exclusive supply agreement;*
>
> (*c*) *exclusive distribution agreement;*
>
> (*d*) *refusal to deal;*
>
> (*e*) *resale price maintenance…"*

will amount to a contravention of Section 3 of the Act if they cause an AAEC in India. However, realizing that Section 3(4) of the Act in its present state may not be sufficient in handling all complex arrangements in the digital and e-commerce space, the Ministry of Corporate Affairs (**MCA**), post its discussion with the Competition Law Review Committee (**CLRC**), made adjustments in the Draft Competition Amendment Bill, 2020 (**Bill**).[9] This was done in the wake of the realization that all commercial arrangements may not fall within the ambit of Sections 3(3) and 3(4) of the Act and standalone application of Section 3(1) has been consistently debated to be insufficient for a comprehensive AAEC analysis that is required to hold an agreement in violation of the Act.[10] Therefore, the MCA has proposed to widen the scope of Section 3(4) of the Act, to include "any other agreements", in order to enable the CCI to examine any kind of commercial arrangement or understanding, irrespective of their structure or kind, if they lead to AAEC in India.

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9 The MCA had invited public comments on the Bill <http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf.> accessed 12 May 2020.

10 The order of the Competition Appellate Tribunal in *Dr L.H. Hiranandani Hospital v CCI* 2015 SCC OnLine Comp AT 1166, [23], [31-33], [38-39].

The Bill proposed the amendment to Section 3(4) along with revision in the definition and scope of certain types of vertical agreements such as tie-in arrangements, exclusive supply arrangements and resale price maintenance, to accommodate novel vertical arrangements such as online selective distribution, online sales bans, minimum advertised prices (**MAP**), dual pricing, etc. However, it is yet to be seen how far the amendments proposed by the Bill come into force as part of a revised competition law legislation, replacing the present Act.

B. Section 4 (Abuse of dominance)

The CCI has also observed that the e-commerce players are capable of violation of Section 4 of the Act.[11] Section 4 prohibits an abuse of a dominant position by any enterprise[12] or group[13] ("**AOD**"). A dominant position is defined in Explanation (a) to Section 4 of the Act to mean a position of strength, enjoyed by an enterprise in the relevant market, in India, which enables it to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Therefore, establishing abuse of dominance of an enterprise or a group under the provisions of the Act is a three-stage process:

(a) Defining the relevant market;

(b) Determining dominance in the relevant market; and

(c) Determining abusive conduct in the relevant market.

Dominance of an enterprise can only be established in the defined relevant markets. Therefore, determination of the relevant market is critical in AOD cases. Once the relevant market is defined, the next step is to determine dominance in the relevant market. In an AOD case, the CCI will evaluate whether the enterprise concerned can operate independently of the competitive forces prevailing in the relevant market. While determining dominance,

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[11] MakeMyTrip case (n 6).

[12] The Explanation to Section 4 of the Act states: ' "*dominant position*" *means a position of strength, enjoyed by an enterprise, in the relevant market, in India which enables it to–*
(a) *operate independently of competitive forces prevailing in the relevant market; or*
(b) *affect its competitors or consumers or the relevant market in its favour.*'

[13] As per Explanation (b) to Section 5 of the Act, the term 'group' means 'two or more enterprises which, directly or indirectly, are in a position to —
(a) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
(b) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
(c) control the management or affairs of the other enterprise.'

the CCI is required to consider the factors listed in Section 19(4) of the Act.[14] Although till date the CCI has not held any e-commerce platforms in violation of Section 4 of the Act, it is presently investigating various e-commerce platforms for possible AOD practices. Some of the allegations brought against e-commerce platforms under Section 4 of the Act have been discussed in Part III of this article.[15]

III. Delineation of the E-Commerce Sector as a Separate 'Relevant Market'

The crucial questions that the CCI faced initially while dealing with some of the cases on vertical restraints in the e-commerce sector have primarily been on the appropriate market definition. Do online vertical agreements between e-commerce platforms and third-party businesses selling on such platforms qualify as distributorship agreements or as inter-mediation platform services agreements? The determination of this query was important for the CCI to enable AAEC analysis specific to the anti-competitive practices of the e-commerce platforms offering inter-mediation services, as they have been gaining significant market presence over the years in these markets.[16]If e-commerce platforms are to be considered as just another mode of distribution of products and services for third party vendors, there are chances that the e-commerce platforms may escape from the CCI's scanner due to their limited market presence in comparison to the overall market of online and offline market of goods and services. Although the CCI has observed the distinct characteristics of these e-commerce platforms in comparison to other offline

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[14] The factors listed in Section 19(4) are:
(i) Market share of the enterprise;
(ii) Size and resources of the enterprise;
(iii) Size and importance of the competitors;
(iv) Economic power of the enterprise, including commercial advantages over competitors;
(v) Vertical integration of the enterprises or sale or service network of such enterprises;
(vi) Dependence of consumers on the enterprise;
(vii) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
(viii) Entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(ix) Countervailing buying power;
(x) Market structure and size of market;
(xi) Social obligations and social costs;
(xii) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an AAEC; and
(xiiii) Any other factor which the CCI may consider relevant for the inquiry.

[15] MakeMyTrip case (n 6).

[16] E-commerce Report (n 9).

or online third-party vendors recently, several questions pertaining to the same still remain unresolved; for instance, what are the relevant criteria to distinguish between the two? What about platforms that also compete with third party sellers on the platforms?

The CCI has held that although offline and online markets differ in terms of discounts and shopping experience, they are merely different channels of distribution of the same product and are not two different relevant markets. In *Ashish Ahuja* v. *Snapdeal*,[17] ("**Snapdeal case**") the CCI noted that consumers weigh available options in both online and offline markets before taking any decision and are likely to shift to either online or offline markets if the price in any one of these markets increases.

In *Mohit Manglani* v. *Flipkart India (P) Ltd.*,[18] the CCI considered the unique features specific to the e-commerce sector, in that such platforms provide an opportunity to the consumers to compare prices as well as various characteristics of the products simultaneously. However, the CCI did not consider it necessary to delineate the relevant market as an 'e-commerce' market, due to the parties not being dominant in both the online and offline markets individually.

Despite the reluctance of the CCI to accept the e-commerce market as a separate relevant market initially, in certain recent judgments it has laid importance on considering the specific characteristics of the e-commerce sector as compared to the offline markets. Unlike the CCI's observations in the Snapdeal case where it considered the e-commerce platform as another mode of distribution of the overall retail supply market, the CCI in *All India Online Vendors Assn.* v. *Flipkart India (P) Ltd.*,[19] noted that there is a difference between an online retail store (that is an extension of the overall retail chain) and an online marketplace platform. Although from the end consumers' perspective the distinction line between online and offline sellers is sometimes blurry, *yet* it cannot be denied that online marketplaces offer convenience and a platform to sellers and buyers to transact among themselves. For sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges, while the benefits afforded to buyers include the comfort of shopping from their homes thus saving time, commuting charges. Moreover, the CCI noted that the buyers can compare multiple goods at the same time. The CCI also noted that an increase in the

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[17] Case No. 17 of 2014.
[18] 2015 SCC OnLine CCI 61.
[19] 2018 SCC OnLine CCI 97.

number of buyers who visit online platforms leads to network effects,[20] an important phenomenon missing in online retail stores or offline markets.

An analysis of the above cases demonstrates that there has been a subtle shift in the relevant market analysis of the e-commerce platforms by the CCI, whereby although the CCI did not expressly delineate such markets as a separate relevant market it considered the distinct features and characteristics of such markets. This is a progressive step and is in line with the international antitrust frameworks (as discussed in Part VI of this paper). This realization will not help the CCI in dealing with the complex implications that such online platforms may have upon the economy, such as distortion of competition in any market, but will assist the CCI in formulating advanced economic tools to conduct AAEC analyses for such two-sided markets.

IV. The Competition Law issues dealt by the CCI in the E-Commerce Sector

As mentioned above, the e-commerce sector is very prone to competition issues arising out of vertical restraints. Some of the most popular and conventional vertical restraints that the CCI has handled in this sector consist of RPM, selective distribution networks and exclusive distribution networks.

A. Minimum RPM

In *Jasper Infotech (P) Ltd.* v. *KAFF Appliances (India) (P) Ltd.*,[21] Jasper, which owns and operates Snapdeal, alleged that Kaff, a manufacturer of chimneys and hobs sold on Snapdeal, was attempting to impose a "Minimum Operating Price" (**MOP**) on Snapdeal to ensure sales do not take place below a minimum price and had threatened to ban online sales if such prices were not maintained. This was the CCI's first substantial order under Section 26(6) where it dealt with allegations of RPM, particularly minimum RPM, on online platforms. However, Kaff was not penalized as the CCI observed that the restrictions imposed on Snapdeal did not cause an AAEC in the market due to a large number of players present in the market of hobs and chimneys in India and which were competing with Kaff on Snapdeal.

[20] Network effects arise in the case of two-sided markets where users on each side of the market derive a positive effect from the addition of new users on the other side. Buyers and sellers on an online marketplace will logically be attracted to a platform that has a large number of users on the other side.

[21] 2019 SCC OnLine CCI 2.

Similarly, in *Counfreedise* v. *Timex Group India Ltd.*,[22] the CCI delved into the alleged anti-competitive conduct in the nature of RPM wherein it was alleged that the Timex Group was discriminating against the informant, i.e., Counfreedise, the distributor of Timex Group's wrist watches on e-commerce platforms vis-à-vis other e-commerce players like Cloudtail, XL Retail, etc. The major allegations pertained to the fact that the Timex Group restricted Counfreedise from offering discounts beyond a particular ceiling limit. It was observed by the CCI that, for RPM to be effective in form of discount control, it has to be imposed on all online retailers and not just the informant; it also stated that any agreement in the nature of RPM must meet the test of causing AAEC in India in order to be termed as anti-competitive. In the present case, the CCI did not find any violation based on RPM as Counfreedise dealt with the sale of wrist watches of various other companies and was not dependent solely upon the sale of Timex Group's products.

Based on the above cases, we can infer that the CCI has taken a flexible approach in relation to dealing with cases on vertical restraints like minimum RPM, given the effects-based approach in the above cases. Nevertheless, in *Jasper* v. *KAFF*, it has acknowledged the pernicious effects of minimum RPM that removes intra-brand competition and its treatment as a hardcore restriction in many antitrust jurisdictions, although it noted that in India such restrictions are to be analyzed through the screen of 'rule of reason'/effects-based approach on a case-by case basis. Given that the CCI has prominently dealt with the pro-competitive benefits of online vertical restraints while referring to how strictly RPM is sometimes treated in other jurisdictions, this may provide an indication that the CCI is still exploring the entire spectrum of antitrust regulation before settling for an appropriate framework to deal with such anti-competitive practices.

B. Other novel competition law concerns

i. Concerns under Section 3(4) of the Act

In *Delhi Vyapar Mahasangh* v. *Flipkart Internet (P) Ltd.*,[23] the CCI noted that both Amazon and Flipkart were following a marketplace-based model of e-commerce, and any vertical agreements between platforms and sellers could be examined under Section 3(4). In this regard, the CCI noted four alleged practices, namely, the exclusive launch of mobile phones, having 'preferred' sellers on the marketplaces, deep discounting, and preferential

[22] 2018 SCC OnLine CCI 67.
[23] 2020 SCC OnLine CCI 3.

listing/promotion of private labels. The observations of the CCI for each one of these allegations are set out below:

(a) **Exclusive launch of mobile phones:** The CCI observed that mobile phone manufacturers like One Plus, OPPO, and Samsung have exclusively launched several of their models on either Amazon or Flipkart. The CCI inferred *prima facie* that these mobile phone manufacturers partner with the e-commerce platforms and their brands are sold by the platforms' exclusive sellers.[24]

(b) **Deep discounting policy:** The CCI noted that certain communications were allegedly sent by Flipkart and Amazon to their sellers for incurring a part of the discounts offered during the big sale events like the Big Billion Days of Flipkart and the Great Indian Festival of Amazon. At the same time, it is alleged that preferred sellers at Amazon and Flipkart are in some way or the other connected to Amazon and Flipkart, respectively, through common investors, directors, shareholders etc. The CCI also perused the prices for different smartphone brands sold through Flipkart and Amazon, i.e. the original price and the discounted price. It was observed that certain smartphone brands/models are available at significantly discounted price on these platforms and are sold largely through the sellers identified by the informant as the 'preferred sellers'.[25]

(c) **Preferential Listing:** The CCI noted that the platforms may have been influenced in favor of the exclusive brands and sellers through higher discounts and preferential listing. The informant also alleged that both Amazon and Flipkart list their preferred sellers in the first few pages of the search results. For instance, the products sold by Cloudtail India and Appario Retail allegedly dominate the first few pages of search results whereas the products with the same ratings sold by non-preferred sellers are listed on later pages. Amazon and Flipkart also used the terms "assured" and "fulfilled" for the products of such preferred sellers.[26]

Given the above allegations against Amazon and Flipkart, the CCI observed that exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an AAEC in India. Thus, the CCI passed an order under Section 26(1) of the Act, directing the DG to probe an investigation against Amazon and

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24 ibid [23].
25 ibid [24].
26 ibid [25].

Flipkart. This case is one of the first major cases to provide some insight into the novel online vertical restraints such as deep discounting policy and preferential listing.

ii. Concerns under Section 4 of the Act

In the *MakeMyTrip case*, issues arose in terms of excluding Treebo and its partner hotels from listing on MMT's platform pursuant to the commercial arrangement between the latter and OYO, price parity restrictions on the MMT platform, and exclusivity conditions on Treebo. Treebo alleged that it agreed to accept the exclusivity agreements put forth by MMT as it incurred excessive losses due to the discontinuance of Treebo properties from MMT's platform (when, earlier, Treebo refused to accept the exclusive terms of MMT). Treebo had no option but to accept the conditions imposed by MMT. The exclusivity agreements were of the following two kinds:

(a) **Price Parity Restriction**: MMT laid down a specific clause wherein it demanded that Treebo maintain price parity with regard to the prices charged by it on MMT and other online travel agencies; and

(b) **Exclusivity Agreement (Exclusivity Restriction)**: Treebo was not permitted to list a certain number of its hotels in major cities on the platforms of two of MMT's competitors, i.e. Booking.com (directly and indirectly) and Paytm (directly), 72 hours prior to check in.

The CCI took cognizance of the issues raised by Treebo in light of the **dominant positions of both MMT (approx. 63%) and OYO (approx.89%) in their respective markets**, and made the following observations under both Sections 3(4) and 4 of the Act in relation to the three major issues highlighted by Treebo as the complainant in this case:

(a) *Firstly*, in relation to the issue of Treebo and its partner hotels being excluded from listing on MMT's platform through abrupt termination pursuant to the commercial arrangement between MMT and OYO, the CCI observed that the restrictive arrangement between OYO and MMT, both of whom have considerable presence in their respective market segments, may lead to refusal to deal which may have AAEC in India.

(b) *Secondly,* in relation to the issue of imposition of price parity arrangements by MMT upon Treebo, the CCI observed that similar restrictions were analyzed by it in a recent case of *Federation of Hotel &*

Restaurant Associations of India v. *MakeMyTrip India (P) Ltd.*[27] ***(FHRAI case)***. The CCI observed that the price parity agreement provides that neither can Treebo provide a better rate to the competing online travel agencies nor can they provide the rooms to them unless those rooms are first made available on the platform of MMT. The CCI observed that such price parity arrangements were in the nature of APPAs, may result in removal of the incentive for platforms to compete on the commission they charge to hoteliers, may inflate the commissions and the final prices paid by consumers and may also prevent entry of new, low-cost platforms. On the basis of this, such parity restrictions were *prima facie* held to be anti-competitive and were directed to be investigated under Section 3(4) as well as Section 4 of the Act.

(c) *Thirdly*, in relation to the imposition of an exclusivity condition by MMT on Treebo, the CCI observed that Treebo was not permitted to list its hotels situated in cities classified under Category A[28] on MMT's two competitors, i.e. Booking.com and Paytm, 72 hours (i.e. 3 days) prior to the check-in day. A similar restriction was imposed upon Treebo for a much longer period, i.e. 30days, in case of hotels situated in Category B[29] cities. The aforesaid restriction *prima facie* appeared unfair, and hence exploitative, under Section 4(2)(a)(i) of the Act. This was because it denied the Treebo partner hotels an opportunity to list on other platforms/online travel agencies and to gain access to those platforms, especially Booking.com which was MMT's closest competitor during the busiest booking periods. Such a restriction also seems to be exclusionary as two online travel agencies were excluded from listing the Treebo chain of hotels, thus potentially leading to denial of market access for those online travel agencies with regard to those hotels branded by Treebo. Thus, apart from *prima facie* appearing to be in contravention of Section 4(2)(a)(i),[30] the

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[27] 2019 SCC OnLine CCI 37.

[28] Category A hotels are hotels in 29 cities, namely Pune, Gurugram, Bengaluru, Manipal, Madurai, Trivandrum, Pushkar, Chandigarh, Mumbai, Coimbatore, Aurangabad, Lucknow, Mangalore, Hyderabad, Ooty, Chennai, Pondicherry, Kochi, Ahmedabad, Munnar, Kolkata, Vizag, Coorg, Indore, Guwahati, Kolhapur, Kodaikanal, Kovalam and Shimla.

[29] Category B are hotels in 25 cities, namely Delhi, Udaipur, Nagpur, Vijayawada, Bhopal, Jodhpur, Jaipur, Mysore, Goa, Dehradun, Ajmer, Nainital, Vadodara, Alleppey, Rishikesh, Haridwar, Amritsar, Nashik, Vagamon, Panchgani, Jamshedpur, Manali, Nellore, Noida and Bhubaneswar.

[30] Unfair and discriminatory condition in purchase or sale of goods or service.

restriction also seems to be *prima facie* in contravention of Section 4(2)(c)[31] of the Act.

The CCI therefore, undertook a *prima facie* view of contravention against MMT for abuse of dominant position under Sections 4(2)(a)(i) and 4(2)(c) of the Act on account of all the three allegations analyzed above. Further, a case against MMT and OYO for entering into a vertical arrangement having an AAEC in the market was also made out under Section 3(4) read with Section 3(1) of the Act. Considering the similarity of facts and allegations, the CCI was of the view that the *MakeMyTrip case* may be clubbed with the *FHRAI case*, in terms of the proviso to Section 26(1) of the Act read with Regulation 27(1) of the Competition Commission of India (General) Regulations 2009 (**General Regulations**). The investigation of these cases is currently being undertaken by the DG.

V. Objective Justifications and Pro-Competitive Benefits

The CCI has been increasingly focusing more on investigating competition issues relating to the e-commerce markets in India, in various instances, especially in relation to cases dealing with vertical restraints in the e-commerce sector. However, given that the CCI analyses vertical restraints based on an effects-based approach, it considers objective justifications and other pro-competitive benefits that such vertical restraints may give rise to as mitigating factors while carrying out the AAEC assessments in such cases.

In *Jasper* v. *KAFF*, the CCI accepted that, many a time, vertical agreements do protect the interests of the end consumer and are pro-competitive. Although restraints such as minimum RPM may adversely affect the price competition between retailers/distributors, vertical restraints nevertheless are a commercially viable option. That is, they could be desirable from the perspective of both manufacturers/retailers and consumers where they are justified in protecting the viability of businesses and offering good quality products and services to consumers. This is as against the intra-brand price competition between retailers/distributors which provides an incentive to free ride in the short-run and under-provision or complete eradication of useful services and goods in the long-run.

Free riding is the most common practice due to which online vertical restraints are sometimes considered desirable by manufacturers or retailers

[31] Practices dealing with denial of market access.

and consumers when there is intra-brand price competition between different distribution channels. One retailer may free ride on the investment of another, typically possible where a manufacturer invests in the marketing and promotion at one retailer's premises which a competing manufacturer takes advantage of. This is where the need to apply vertical restraints comes in handy, in order to effectively safeguard the investments made by the stakeholders of a product, and may be considered as a reasonable commercial justification. However, the thin balance of the pro-competitive benefits of online vertical restraints as against the anti-competitive outcomes that such restrictions may have is where the CCI's obligation to regulate the online vertical restraints becomes necessary.

Other accepted justifications include protection of one's brand reputation and goodwill, quality control and authenticity certification, or protection from counterfeit/spurious products (an issue that is rampant in India's e-commerce ecosystem), etc. In relation to the counterfeiting of products, it is to be noted that resolving the issues of information asymmetries between buyers and sellers, where the end consumers have lesser information about products than their online sellers due to the inability of the consumer to physically inspect a product prior to purchase, can help restrict the adoption of online vertical restraints. The CCI must keep a close check upon the reasonable applicability of online vertical restraints in any market in comparison to the threat that they may pose. In order to understand the unique dimensions of the e-commerce sector and its interaction with practices such as vertical restraints, along with the other peripheral factors that have an impact upon functioning of this sector like network effects, the CCI undertook an intensive study of the market and published the E-commerce Report.

VI. E-commerce Report

In *Jasper* v. *KAFF* as well as in the *MakeMyTrip case*, the CCI relied upon the international jurisprudence on online vertical restraints imposed by or on e-commerce platforms, including certain novel vertical restraints peculiar to the online market. These included MFN clauses, APPAs, non-price restrictive clauses, etc. Taking cognizance of the above issues relating to the digital marketing and the e-commerce sectors, the CCI released the E-commerce Report in order to throw some light on the novel types of vertical restraints and to provide sufficient guidance and reference points to the industry at large to help them understand what kinds of issues the CCI may deal with in the near future.

A. Background of the E-commerce Report

The E-commerce Report was initiated by the CCI in April 2019 and entails a combination of secondary research, questionnaire survey, focused group discussions, one-on-one meetings, a multi-stakeholder workshop and written submissions of stakeholders, covering the three broad categories of: (i) e-commerce in consumer goods (mobiles, lifestyle, electrical & electronic appliances and grocery); (ii) accommodation services; and (iii) food services. Around 16 online platforms, 164 business entities [including sellers (manufacturers and retailers) and service providers (hotels and restaurants)] and 7 payment system providers from across India participated in the study. In addition, 11 industry associations, representing different stakeholder groups, also participated.[32]

B. Issues discussed in the E-commerce Report

Some of the key competition concerns identified by the study in the e-commerce sector are:[33]

(a) **Platform Neutrality:** The competition issue recognized herein is that e-commerce sites, when they serve as both a marketplace and a competitor on that marketplace, have the incentive to leverage their control over the platform in favour of their preferred vendors or private label products to the disadvantage of other sellers. The E-commerce Report states that the access that platforms have to both consumers and price data have enabled a strategic stronghold on the retail market with various platforms entering the market with their private labels. This provides greater access to such online platforms to manipulate the choices of the consumers and impose restrictions over the competitors of their own preferred sellers. The CCI has taken up this issue in a few of the significant decisions including *Jasper* v. *KAFF* as well as the recent *MakeMyTrip* case, where it is still investigating such practices. In hindsight, to deal with such practices, the CCI must regulate the unnecessary increase in transparency that is initiated by the online platforms and must develop proper economic tools to establish the harm that such two-sided platforms cause to the vendors and the end consumers.

(b) **Platform to Business Contracts:** The report states that the imposition of arbitrary terms in contracts by big platforms creates a situation

[32] Available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1598745> accessed 12 May 2020.

[33] E-commerce Report (n 8).

where the business of a retailer is at the mercy of the big platform players and their unilateral revision of terms. This was also observed by the CCI in the *FHRAI case*, wherein it acknowledged the dominant position of the online travel agencies and initiated investigation into the abuse of dominance.

(c) **Price Parity Clauses:** Price parity clauses, which require that retailers don't offer better prices on other marketplace platforms and/or on their own website, were identified as potentially distortive. This reduces inter-platform competition and encourages oligopolistic coordination between platforms to control the competitiveness of the market. Both APPAs and MFNs are parity arrangements. They may also apply to quantity or volumes which can restrict a supplier's ability to allocate inventory across a range of distribution channels in response to competition between platforms.[34] Parity agreements foreclose the market by (i) deterring entry of rival platforms as they make it harder for new entrants to attract suppliers to the new platforms; (ii) preventing an intermediary from selling directly; and (iii) enabling horizontal collusion in the downstream market leading to higher prices on consumers (like a "hub and spoke" cartel).

(d) **Exclusive Agreements:** Exclusive agreements are along the lines of platform-bundling where a product will only be launched on a specific platform or where a platform would only list products of a certain brand in a category. Listing of only a single brand/service provider in a given product category on a major platform can make it difficult for rival brands/service providers to get their products before the consumers. On the other hand, exclusive agreements can also generate efficiencies and improve competition among the brands of different manufacturers or service providers. Thus, the CCI always adopts an effects-based approach to assess such agreements.

(e) **Deep Discounts:** In a market where consumers have a tendency to flock towards discounts, the extremely discriminatory discount policies of platforms have been identified as an anti-competitive factor by the CCI. Forcing prices to be lower than costs have led to erosion of profitability while non-participation in discount policies has led to demotion in search rankings which is discriminatory in nature.

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[34] Available at <https://centrocedec.files.wordpress.com/2015/07/special-project_online-vertical-restraints-2015.pdf> 66, accessed 12 May 2020.

C. Implications of the E-commerce study

The E-commerce Report discusses the issues that may, directly or indirectly, have a bearing on competition, or may hinder realisation of the full pro-competitive potential of e-commerce. The CCI is of the view that many of these issues would lend themselves to a case-by-case examination by the CCI under the relevant provisions of the Act. On the basis of the market study findings, the enforcement and advocacy priorities for the CCI in the e-commerce sector in India are as follows:

(a) Ensuring competition on the merits to harness efficiencies for consumers;

(b) Increasing transparency to create incentive for competition and to reduce information asymmetry; and

(c) Fostering sustainable business relationships between all stakeholders.[35]

Some of the major competition law concerns that may be deduced from the E-commerce Report are in relation to bargaining power imbalance and information asymmetry between e-commerce marketplace platforms and their business users. Thus, without violation of competition law, improving transparency in certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes. In this regard, the CCI under its advocacy mandate encourages the e-commerce platforms to implement certain self-regulatory measures to put in place transparency measures such as:[36]

(a) **Search ranking**: E-commerce platforms may consider setting out up-front:-

- A general description of the main search ranking parameters, drafted in plain and intelligible language and keep that description up to date;
- A description of the main parameters where there is a possibility of influencing ranking against any direct or indirect remuneration paid by business users and of the effects of such remuneration on ranking; and
- Any other relevant information not amounting to disclosure of algorithms or any such information that may enable or facilitate manipulation of search results by third parties.

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[35] (n 28) 35.

[36] ibid 35-37.

(b) **Collection, use and sharing of data:** Set out a clear and transparent policy on data that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.

(c) **User review and rating mechanism:** Adequate transparency about user review and rating mechanisms is necessary for ensuring information symmetry, which is a prerequisite for fair competition. Adequate transparency to be maintained in publishing and sharing user reviews and ratings with the business users. Reviews for only verified purchases to be published and mechanisms to be devised to prevent fraudulent reviews/ratings.

(d) **Revision in contract terms:** Notify the business users concerned of any proposed changes in terms and conditions. The proposed changes not to be implemented before the expiry of a notice period, which is reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the business user concerned.

(e) **Discount policy:** Bring out clear and transparent policies on discounts, including the basis of discount rates funded by platforms for different products/suppliers and the implications of participation/non-participation in discount schemes.

VII. International Jurisprudence on Similar Issues

Internationally, inquiry and investigation into the practices of e-commerce platforms and digital markets has been the focus area for most of the competition law regulators around the world. In response to the Australian Competition and Consumer Commission inquiry into digital platforms, the Australian government has announced it will implement 23 recommendations from the report. The reforms are meant to address:

> "*the substantial market power that has arisen through the growth of digital platforms, their impact on competition in media and advertising markets and implications for news media businesses, advertisers and consumers*".[37]

On the other hand, the German Bundeskartellamt terminated the abuse of dominance proceedings against online retail giant Amazon following

[37] Available at <https://www.competitionlawinsight.com/competition-issues/digital-platforms-down-under--1.htm> accessed 12 May 2020.

complaints from sellers using the platform as part of their e-commerce strategy, after Amazon agreed to change its business terms with its dealers.[38]

Even in cases of merger control relating to e-commerce platforms, competition regulators across the world are now cautious. For instance, the UK's Competition and Markets Authority ("**CMA**") has referred Amazon's proposed investment in Deliveroo, the UK-based food delivery firm, for an in-depth investigation after raising "serious concerns" about the deal's potential impact on UK consumers. The CMA initially announced its decision on 11 December 2019 and gave the parties the opportunity to offer undertakings. When no such undertakings were offered, the CMA referred the deal for a phase two inquiry on 27 December 2019.[39]

The European Commission (**EC**), being one of the most proactive competition law regulators in the world, has put specific regulations in place to combat the concerns raised by the e-commerce platforms. For instance, the EC's Geo-blocking Regulations of 2018 condemn the geo-blocking restrictions based on a consumer's nationality, place of residence or establishment as discriminatory according to the principles of the European Union. Geo-blocking refers to business practices whereby retailers and service providers prevent online shoppers from purchasing consumer goods or accessing digital content services because of the shopper's location or country of residence and is a unique vertical restraint which concerns cross-border online sales. Further, the EC adopted the final report on the e-commerce sector inquiry on 10 May 2017 and confirmed that the growth of e-commerce over the last decade has been responsible for increasing online price transparency and price competition and had a significant impact on companies' distribution strategies and consumer behaviour.[40]

VIII. Concluding Remarks

The changing face of the global economy towards digitization has replaced the traditional business models with online markets. The online marketplaces being multi-sided platforms connect sellers, buyers and advertisers

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[38] Available at <http://competitionlawblog.kluwercompetitionlaw.com/2019/07/30/bundeskartellamt-ends-abuse-probe-after-amazon-agrees-to-changing-business-terms-for-dealers/> accessed 12 May 2020.

[39] Available at <https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry> accessed 12 May 2020.

[40] *Report from the Commission to the Council and the European Parliament, Final Report on the E-Commerce Sector Inquiry* <https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf>, accessed 12 May 2020.

to facilitate transactions between them. Such platforms offer a multisided environment that internalizes transaction costs and takes advantage of the network effects across the different user groups.[41] Such platforms have led to increased levels of price transparency in the market along with price competition, affecting the distribution and pricing strategies of both manufacturers and retailers. As a reaction to increased price transparency and price competition, manufacturers have sought greater control over distribution networks, with a view to better controlling price and quality. This translates into an increased presence of manufacturers at the retail level and increased recourse to agreements or concerted practices between manufacturers and retailers ('vertical restraints'), affecting competition among retailers selling the same brand ('intra-brand competition'). Such vertical restraints existing in online marketplaces like the e-commerce sector are just as innovative as the sector itself. These are by no measure traditional vertical restraints, with their distinct sets of effects and implications for competition regulation.

In light of the above, we believe that Section 3(4) read with Section 3(1) of the Act can squarely cover these anti-competitive practices when they are in the nature of anti-competitive agreements. When the competition concerns in the e-commerce sector are raised by any dominant entity's unilateral conduct, such conduct may be scrutinized under Section 4 of the Act by the CCI. However, it may require the aid of e-commerce sector-specific rules and regulations to enable the CCI to deal with the intricacies and peculiarities of the e-commerce sector, such as network effects, cross-border sales, use of algorithms, counterfeiting, etc. In this regard both the Bill and the E-commerce Report may be considered as important reference points to lay the foundations of a strong competition law enforcement regime for dealing with online platforms. Further, the CCI is proceeding in the right direction in adopting the rule of reason approach in dealing with the cases of online vertical restraints as it is essential for the regulator to balance the anti-competitive effects with the pro-competitive rationale or objective justification of the particular restrictions while adjudicating these cases. However, the future of how the CCI will deal with the growing complexities in the e-commerce sector depends upon the fate of cases like *MakeMyTrip* and *FHRAI* as well as upon the course that the Indian judiciary takes while adjudicating objections of big players like Amazon and Flipkart against the probes of the CCI.

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[41] With indirect network effects or cross-side network effects, the value of the service increases for one user group when a new user of a different user group joins the network/platform. In the context of e-commerce platforms, the more consumers are on the platform, the more valuable the platform is to sellers/service providers and vice versa.

Evolution of Copyright Law – The Indian Journey

*Justice Prathiba M. Singh**

Out of all the forms of protection given to innovation and creation, copyright law is the most versatile. This law encompasses recognition, protection and enforcement of rights for a very large variety of creative works including traditional forms of works such as books, articles, poetry, lyrics of songs, paintings, musical compositions, sculpture, architecture, script in a drama or a film, to modern forms of copyrighted works such as computer software, databases, compilations, broadcasts etc. Protection for copyright finds its justification in fair play[1]. The law strikes a fine balance between the rights and interests of authors/owners of copyright and the right of the public to access public domain material. The three most important areas that determine this balance are:

1. The Test of Originality;
2. Remedies for Copyright Violations, and;
3. Fair Use/Fair Dealing provisions

The manner in which judicial precedents have evolved on these core are as shows that India has actually curated copyright law to suit its social, economic and cultural context.

I. Fundamental Principles

No discussion on Indian copyright law can begin without reference to the seminal decision of the Supreme Court in ***R.G. Anand v Delux Films***[2]. This

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[1] *Eastern Book Co. v D.B. Modak* (2008) 1 SCC 1 : AIR 2008 SC 809.

[2] *R.G. Anand v Delux Films* (1978) 4 SCC 118.

case lays down the basic principles of the idea-expression dichotomy – that copyright exists not in an idea but only its expression. While dealing with an adaptation of the play 'Hum Hindustani' the Supreme Court held that there cannot be copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work. The Court was interpreting the Copyright, Patents and Designs Act of 1911. The Court also observed on the test for infringement –

> *"One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original."*

Thus, the Supreme Court paved the way for development of copyright law, by laying down fundamental principles in clear terms.

The law of copyright has evolved over the years to extend to not only original works but also to derivative works such as cinematograph films and sound recordings that are recognized for their commercial value. These are works which are an amalgam of various original works. The classification under the Copyright Act, between original works and derivative works, is of significance as the copyright industry expands into unknown terrain.

II. Originality

There are two categories of works that qualify for copyright protection – Original works and Derivative works. For the former category of works, copyright protection is not in doubt. In the latter category, since derivative works such as databases, compilations etc., are based on primary works the question of originality is trickier. Case law on copyright recognizes the rights of compilers who use mental labour and capital to modify an existing work or create a new compilation. In ***Gopal Das v Jagannath***[3], the Allahabad High Court considered two books written on the same theme and held that a compiler of a work which does not have absolute originality would be entitled to use the works forming part of the compilation, if he expends sufficient labour and subjects the same to revision and correction, so as to produce

3 *Gopal Das v Jagannath Prasad* 1938 SCC OnLine All 287 : AIR 1938 All 266.

an original result. Similarly, in ***V. Govindan***[4], the Madras High Court held that the amount of originality required in case of a compilation is not very high and even a 'small' amount of originality is entitled to protection. If sufficient skill, labour and brain has been expended, the test of originality would be satisfied.[5] In ***Cunniah v Balraj***[6], which dealt with a painting, the Court held that the changes introduced by the Defendant did not satisfy the test of originality to render the Defendant's work an independent work, thus the Plaintiff's prayer for injunction was granted.

In ***Agarwala Publishing House***[7], the Allahabad High Court held that examination papers are original literary works as the preparation of such papers required selection, judgment and experience, and the author was expected to employ sufficient labour and skill. In ***Rupendra Kashyap***[8], the Delhi High Court took a similar view and held that question papers would constitute original literary works being the product of the labour and skill of the author.

The test of originality that was followed in the above cases was in line with the English judgments of ***Ladbroke v Hill***[9] and ***University of London Press***[10], which laid down the '*sweat of the brow*' doctrine as the standard for originality. In ***Rai Toys Industries***[11] like in ***Ladbroke v Hill***[12], the High Court of Delhi recognized the skill and labour employed in creation of a Tambola ticket compilation. The Court held that a compilation of Tambola tickets was original enough for being protected as an original literary work. In the Court's opinion, the arrangement of numbers in tickets is the individual work of the person who prepares it, it bears his individuality and long hours of labour.

In ***Burlington Home Shopping***[13], which was one of the first cases on database protection in India, the Plaintiff who was running a home shopping

4 *V. Govindan v E.M. Gopalakrishna Kone* 1954 SCC OnLine Mad 368 : AIR 1955 Mad 391.

5 ibid [8].

6 *C. Cunniah and Co. v Balraj and Co.* 1959 SCC OnLine Mad 15 : AIR 1961 Mad 111.

7 *Agarwala Publishing House v Board of High School and Intermediate Education U.P.* 1966 SCC OnLine ALL 124 : AIR 1967 All 91.

8 *Rupendra Kashyap v Jiwan Publishing House* 1996 SCC OnLine Del 466 : (1996) 16 PTC 439.

9 *Ladbroke (Football) Ltd. v William Hill (Football) Ltd.* (1964) 1 WLR 273 : (1964) 1 All ER 465.

10 *University of London Press Ltd. v University Tutorial Press Ltd.* [1916] 2 Ch 601.

11 *Rai Toys Industries v Munir Printing Press* 1982 PTC 85.

12 *Ladbroke* (n 9).

13 *Burlington Home Shopping (P) Ltd. v Rajnish Chibber* 1995 SCC OnLine Del 746 : (1995) 15 PTC 278.

catalogue business, claimed rights in the database of its customers. An ex-employee who had copied the database was sued for infringement of copyright and the defence taken was that the compilation of addresses did not have sufficient originality to be protected under copyright law as a literary work. The Court however applied the '*sweat of the brow*' doctrine and held that a compilation of addresses, which was developed by devoting sufficient time, labour and skill would be an original literary work, even though it may have been derived from common sources such as telephone directories and other public sources.

The judgment of the Supreme Court in ***Eastern Book Co. v D.B. Modak***[14] (hereinafter, 'EBC'), however marked a pivotal moment in the course of Indian copyright law. The Court was considering the question as to whether law journals which published the judgments of the Supreme Court with some copy-editing inputs were original literary works, entitled to copyright protection. The Court first upheld the finding of the High Court that publishers of 'Supreme Court Cases (SCC)' are not the authors of judgments of the Supreme Court. It held that judgments are works in public domain in view of Section 2(k). The Court highlighted the distinction between original works also termed as primary works and derivative works also termed as secondary works. It reviewed the test of originality as applicable to derivative works, as laid down in ***Ladbroke v Hill***[15] and ***University of London Press***[16] judgments, and contrasted the same with the position in the U.S., as laid down in ***Feist Publications***[17] and ***Matthew Bender***[18]. In the former, the test was one of capital and labour i.e. the *'sweat of the brow'* and in the latter, the U.S. courts had laid down the test of *'modicum of creativity'* as being an essential condition for originality. The Supreme Court, after reviewing the varied approaches in different jurisdictions, finally followed the approach of the Supreme Court of Canada in ***CCH Canadian Ltd.***[19]**.** The Court held:

> "*38*. It is the admitted position that the reports in the Supreme Court Cases (SCC) of the judgments of the Supreme Court is a derivative work in public domain. *By virtue of Section 52(1) of the Act, it is expressly provided that certain acts enumerated therein shall not constitute an infringement of copyright. Sub-clause (iv) of Clause (q) of*

[14] (2008) 1 SCC 1 : AIR 2008 SC 809.
[15] *Ladbroke* (n 9).
[16] *University of London* (n 10).
[17] *Feist Publications Inc. v Rural Telephone Service Co.* 1991 SCC OnLine US SC 46 : 113 L Ed 2d 358 : 499 US 340 (1991).
[18] *Matthew Bender & Co. v West Publishing Co.* 158 F 3d 674 (2nd Cir 1998).
[19] *CCH Canadian Ltd. v Law Society of Upper Canada* 2004 SCC 13 : 2004 SCC OnLine Can SC 13 : (2004) 1 SCR 339 (Canada).

Section 52(1) excludes the reproduction or publication of any judgment or *order of a* Court, *Tribunal* or *other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the Court, the Tribunal or ocher judicial authority from copyright.* The judicial pronouncements of the Supreme Court would be in the public domain and its reproduction or publication would not infringe the copyright. *That being the position, the* copy-edited judgments would not satisfy the copyright merely by establishing amount of skill, labour and capital put in the inputs of the copy-edited judgments and the original or innovative thoughts for the creativity are completely excluded. Accordingly, original or innovative thoughts are necessary to establish copyright in the author's work. *The principle where there is common source the person relying on it must prove that he actually went to the common source from where he borrowed the material, employing his own skill, labour and brain and he did not copy, would not apply to the judgments of the courts because there is no copyright in the judgments of the court, unless so made by the court itself.* To secure a copyright for the judgments delivered by the court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed in SCC some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one. *The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, co-ordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Indian Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Supreme Court.* We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain *as by virtue of Section 52 of the Act there claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital.* The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation

or inputs put in the judgment would not satisfy the test of copyright of an author"

In the context of copy-edited judgments, the Court held that since judgments were themselves in public domain, the reproduction or publication of the same would not infringe copyright. To claim protection as a derivative work, the variation made by law journals had to be substantive, which would not be permissible, as editing of judgments is not allowed. The Court held that the copy-edited text of the judgments would not be original works as there was no substantive difference between the raw text and the copy-edited text of the judgments. The clear finding was that mere *'sweat of the brow'* i.e. capital and labour would not be sufficient for claiming copyright in derivative works. Exercise of skill and judgment was needed for gaining protection which the copy-edited text did not satisfy. The various inputs which may have been provided by the law journal were merely of labour and capital and not exercise of skill and judgment. The Court did not disturb the position that head notes and short notes would be original literary works. In the copy-edited text, some inputs such as para-numbering, comments such as 'concurring' etc. were protected. Thus, with the ***EBC***[20] judgment, India changed the course of the test for originality required for claiming copyright in derivative works. A mere machine created compilation would thus not be entitled to copyright under Indian law.

The post ***EBC***[21] era, saw several judgments emanating from various High Courts. In ***Reckeweg v Adven***[22] the question before the Delhi High Court was whether the sequencing of medicines, description, formulation and literature of the Plaintiff's homeopathic medicines qualified for copyright protection. The Court applied the ***EBC***[23] standard and held that mere skill, effort or industry does not result in a copyrightable work. There ought to be some intellectual effort to create a work of a different character. Thus, the Court held that the sequencing of medicines would not be copyrightable. Even the literature consisting of the series and curative elements would not be copyrightable. It held that the findings in ***Reckeweg v Sharma***[24] being of an interim nature would not be binding. In ***Mattel v Jayant Agarwalla***[25],

[20] *Eastern* (n 14).
[21] ibid.
[22] *Reckeweg and Co. Gmbh v Adven Biotech (P) Ltd.* (2008) 38 PTC 308.
[23] *Eastern* (n 14).
[24] *Dr. Reckeweg & Co. Gmbh v S.M. Sharma* 2006 SCC OnLine Del 436 : (2006) 130 DLT 16.
[25] *Mattel Inc. v Jayant Agarwalla* 2008 SCC OnLine Del 1059 : (2008) 38 PTC 416.

the Delhi High Court held that the Scrabble game did not measure up to the originality standard required by ***EBC***[26]**.**

In ***University of Oxford v Narendra Publishing House***[27] and ***University of Cambridge v B.D. Bhandari***[28], the question was whether the questions at the end of each chapter, in Mathematics and English textbooks, were original enough to entitle them for copyright protection. The Single Judge in the ***Oxford v Narendra Publishing House***[29] case held that questions in Mathematics did not meet the originality standard of ***EBC***[30]**.** However, the Division Bench reversed the said finding and held that the required skill, judgment and labour test was satisfied for framing of Mathematics questions. This judgment is also significant in the context of fair use/fair dealing, which would be discussed later.

In ***Servewell Products***[31] the Court held that the tray-designs of the Plaintiff did not result in a copyrightable artistic work.

DNA sequences in hybrid seeds, did not qualify as original literary works as per ***Emergent Genetics***.[32] According to the Court, since the DNA sequence in a seed was merely extrapolated from nature, there was no creativity and hence the sequence did not have originality to attract copyright protection.[33]

In ***Akuate Internet Services***[34], the Delhi High Court was dealing with information/facts from cricket matches, for example, cricket scores etc, which the Court held to be 'public domain information', lacking originality. In ***Tech Plus Media***[35], ***Navigators Logistics***[36] and ***Satish Kumar***[37], customer databases were held by the Delhi High Court to not satisfy the originality standard of ***EBC***[38] and hence not entitled to protection. In ***Dart Industries***[39],

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26 *Eastern* (n 14).

27 *University of Oxford v Narendra Publishing House* 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

28 *University of Cambridge v B.D. Bhandari* 2011 SCC OnLine Del 3215 : (2011) 47 PTC 244.

29 *Oxford* (n 27).

30 *Eastern* (n 14).

31 *Servewell Products (P) Ltd. v Dolphin* 2010 SCC OnLine 1456 : (2010) 43 PTC 507.

32 *Emergent Genetics India (P) Ltd. v Shailendra Shivam* 2011 SCC OnLine Del 3188 : (2011) 47 PTC 494.

33 ibid [28].

34 *Akuate Internet Services (P) Ltd. v Star India (P) Ltd.* 2013 SCC OnLine Del 3344.

35 *Tech Plus Media (P) Ltd. v Jyoti Janda* 2014 SCC OnLine Del 1819 : (2014) 60 PTC 121.

36 *Navigators Logistics Ltd. v Kashif Qureshi* 2018 SCC OnLine 11321 : (2018) 76 PTC 564.

37 *Satish Kumar v Khushboo Singh* 2019 SCC OnLine US SC 10671.

38 *Eastern* (n 14).

39 *DART Industries Inc. v Techno Plast* 2016 SCC OnLine US SC 4016 : 2016 (67) PTC 457 (Del).

the drawings of Tupperware products were again held to be not entitled to copyright protection. In ***Ravinder Singh v Evergreen***[40] however, where the Defendant's guidebooks were a mere reproduction of the question papers, the Delhi High Court upheld the claim for copyright.

Works which are capable of protection under copyright include both Original works *per se* and Derivative works. A review of case law in India shows that in the case of derivative works in view of the principles laid down in ***EBC***[41], some amount of skill and judgment is required to satisfy the test of originality. Mere compilations have been refused protection. The amount and value of corrections and improvements as also independent skill and labour have to be judged – so as to make the creator of the derivative work the author of it. In the U.S., exercise of more skill and judgement is needed. However, as per Indian law, little bit of skill, labour and capital is sufficient for a copyright in a derivative work. Though the literary merit need not be gone into, the exercise of skill and judgment ought not to be trivial. The quality and character of the derivative work ought to be distinct from the original work. The selection, co-ordination or arrangement of pre-existing data also ought to have a different character.

This discussion is of great importance currently in the context of the value that is being attached to data, and innovation based on data. In the near future, substantial creativity and innovation will be based upon data analysis and application. Whether such compilations of data *per se* would be entitled to copyright protection is a significant issue. Aggregation of data with employment of skill and judgment in a manner so as to make the data useful and implementable in varying applications and industries would involve enormous effort. A combination of such skill, effort and labour with an exercise of judgment to utilise the data for practical application in specific industries ought to satisfy the test of derivative works as laid down in ***EBC***[42]. Any reports, analysis based on such data would be treated as original works.

In so far as completely original works are concerned, since they are *per se* original, the question of testing them on any such parameters would not arise. It is only in the context of 'derivative works' or 'transformed works' such as compilations, databases etc., which are derived from common sources, that the question of originality as laid down in ***EBC***[43] needs to be applied. If an author creates a completely new work, irrespective of how impressive,

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[40] *Ravinder Singh & Sons v Evergreen Publications (India) Ltd.* FAO 235 of 2017, decided on 10th January, 2018.

[41] *Eastern* (n 14).

[42] ibid.

[43] ibid.

aesthetic or creative it may or may not be, such a work is entitled to copyright protection. Thus, the drawing of a simple cartoon or a painting or a simple amalgam of colours, a small poem irrespective of the quality and creativity is entitled to copyright protection.

III. Remedies for Copyright Violations

The Copyright Act, 1957 confers exclusive rights to copyright owners under Section 14 of the Act. Broadly, in case of original works, the exclusive rights which a copyright owner enjoys includes the right to reproduce the work, issue copies of the work, perform the work in public, communicate the work to the public, make translations or adaptations of the work etc. There are some specific rights given in the case of computer programmes, such as rental rights. In the case of artistic works, copyright owners have the right to convert two-dimensional works into three-dimensional works and *vice versa*. In the case of other works, such as cinematograph films and sound recordings, the storing of these works is the exclusive right of the owner. In the case of a cinematograph film, even the right to make a photograph of any image of the film vests with the owner. Rental rights of these works also vest with the owner. Though the statute was enacted in 1957, it has thereafter been amended substantially in 1983, 1984, 1994 and 2012.

The definition of *"communication to the public"* under Section 2(ff) is wide. It includes any means, other than by issuing physical copies, by which the copyrighted work is made available for being seen, heard or otherwise enjoyed by the public. If any person does anything, the exclusive right for which vests with the owner, or permits any place to be used for communication of the work for profit, the same would constitute infringement of copyright under Section 51. This would include making for sale, hiring, selling, displaying, giving out on rental, distributing for commercial purposes, exhibiting for commercial purposes or importing for commercial purposes any infringing copy of the work. "Infringing copy" is defined in Section 2(m) and would include any unauthorized copy of the work. Thus, copyright owners' rights are broad and all encompassing.

The beauty of the Copyright statute lies in the fact that the terminology used is so wide so as to include all forms of dissemination. The term *"communication to the public"* is so wide that it, in fact, covers every form of dissemination or making of a copy, whether it be a hard copy on paper or soft copy on a USB stick/computer/hard drive/phone etc. Growth in digital technology has led to newer methods of infringing copyright but the statute

covers all such modes and methods. While not many amendments have been required in the statute, innovative remedies have been conceived by Courts to ensure that the exclusive rights vested in copyright owners are adequately protected.

It is a matter of common knowledge that digital technology has made dissemination very easy and on most occasions, untraceable. Initially, when a film used to be released, producers and owners had to file civil and criminal complaints for seizure of pirated VCDs and DVDs from notorious *bazaars* in various cities. Even with the advent of computer software, companies used to conduct periodic raids in known markets where CDs containing pirated software were regularly sold. In recent years, however, the modes of infringement have changed considerably. Apart from the infringement taking place in physical markets and shops selling pirated books, pirated CDs, pirated DVDs etc., the predominant form of infringement now takes place on the internet. In respect of real-world infringement, remedies of injunctions, appointment of Local Commissioners etc. are quite prevalent and well settled. In most copyright infringement matters in the last several years, injunctions have been granted directing cable operators and multi-system operators not to disseminate unlicensed content. It has been quite usual for producers to approach the court at least one week before the release of their film seeking such injunctions and appointment of Local Commissioners. There have also been cases where, in order to protect rights in a literary work, a suit for injunction has been filed seeking directions to be issued to the police to monitor and ensure that pirated copies are not sold openly, for example at traffic signals etc. Though these orders were passed in civil suits, Courts had created a blend of civil and criminal enforcement mechanisms by directing the local SHO to enforce the injunction order. This by itself was an innovative method of ensuring that copyright offences do not go unchecked, as the same may not be a priority for the police.

In the last decade or so, the prevalence of the internet has required Courts to couch remedies for copyright infringement in a manner that the infringer is unable to escape with the infringement. One of the first cases which dealt with this issue was ***Star India v Haneeth***[44], where Star India Pvt. Ltd. approached the Delhi High Court for an injunction blocking entire websites which had infringing content. The practice until then was to merely block the URL[45] i.e., the specific web-page containing the infringing content and not the entire website. However, owing to the prolific nature of infringement on

[44] *Star India (P) Ltd. v Haneeth Ujwal* (2014) 7 HCC (Del) 333 : (2014) 60 PTC 504.
[45] Uniform Resource Locator.

certain websites, broadcasters sought a blocking order against the websites as a whole. Such websites which had predominantly infringing content were called *'rogue websites'*. In view of the various submissions made by the parties, including that *'rogue websites'* blatantly infringe copyrighted material and pose a security risk to unsuspecting users, an *ex parte ad interim* injunction was passed blocking the rogue websites. The question as to whether entire websites ought to be blocked or not then arose in ***Department of Electronics & IT***[46] before the Division Bench. The Delhi High Court heard a challenge by the government against a blocking order *qua* entire websites. The government took the position that only the URLs ought to be blocked. However, the Division Bench held that in the case of rogue websites, blocking of URLs is not sufficient and the entire website ought to be blocked. The reasoning given by the Court is as under:

> *"14. The respondent has placed enough material in the suit to show that the rogue websites are indulging in rank piracy and thus prima-facie the stringent measure to block the website as a whole is justified because blocking a URL may not suffice due to the ease with which a URL can be changed, and as noted above, the number of URLs of the rogue websites range between 2 to 2026 and cumulatively would be approximately 20,000. It would be a gargantuan task for the respondent to keep on identifying each offending URL and especially keeping in view that as and when the respondent identifies the URL and it is blocked by the ISP, the rogue website, within seconds can change the URL thereby frustrating the very act of blocking the URL."*

After this judgment of the Delhi High Court, it became common practice to grant injunction orders blocking entire websites which had predominantly infringing content. Courts also passed orders directing the Department of Communications and MEITY to block access to rogue websites. The Bombay High Court, however, in ***Balaji Motion Pictures***[47] favored blocking of only infringing URLs and not the entire website.

It was then realized that blocking of entire websites was also not sufficient as a 'redirect website' or a 'mirror website' was being created by these website owners to escape the injunction order. For example, if the original website was *abc.com*, the mirror or the redirect website was called *abc1.com* and the entire data which was available on *abc.com* could now be found on *abc1.com*. This practice, which was rampant, required the copyright owner

[46] *Department of Electronics and Information Technology v Star India (P) Ltd*. 2016 SCC OnLine Del 4160.

[47] *Balaji Motion Picture Ltd. v Bharat Sanchar Nigam Ltd*. 2016 SCC OnLine Bom 6607.

to file a fresh suit seeking an injunction against the mirror/redirect website. Thus, enforcement of rights became more onerous for the copyright owner, also leading to higher costs and multiplicity of litigation. The real speed with which rogue websites were creating mirror/redirect websites made the implementation of the injunction extremely difficult. In ***UTV Software Communication***[48]*,* the Delhi High Court considered the judgment of the Singapore High Court in ***Disney Enterprises***[49], to hold that a solution needed to be found to stop the proliferation of websites with infringing content. After considering the judgment of the Singapore High Court and various provisions of Indian law, the Delhi High Court implemented the concept of a *'dynamic injunction'*, in order to prevent copyright infringement by mirror/redirect websites. A 'dynamic injunction' refers to an injunction order which is not static but dynamic. Though the first injunction order may be applicable only to one website, if mirror websites are created, the injunction would dynamically apply to the said mirror websites as well. The copyright owner is merely required to bring the factum of creation of a mirror website to the notice of the Registrar by way of an affidavit/application and the injunction would then automatically extend to the mirror/redirect website.

One of the biggest challenges copyright owners continue to face is on digital and online platforms selling infringing works and also e-commerce marketplaces. Digital platforms and online marketplaces usually seek protection under Section 79 of the Information Technology Act, 2000 and argue that they do not monitor the products being sold as they are merely intermediaries and hence, they are not liable for violation of any copyright. This issue has been considered in the context of the Copyright Act in ***Myspace v Super Cassettes***[50], wherein the Division Bench of the Delhi High Court has interpreted the judgment of the Supreme Court in ***Shreya Singhal***[51]*,* and laid down the manner in which it has to be applied for copyright infringement. The Division Bench has held that intermediaries can claim the defence of 'safe harbour' and the 'place' as referred to in Section 51(a)(ii) could be a digital platform. However, if the intermediary satisfies the conditions under Section 79, no liability can be imposed on it but if any of the provisions of Section 79 are found to have been violated by the intermediary i.e., by exercising control over the content or aiding/abetting the violation, then the safe harbour defence would not be available. The Division Bench finally ruled that intermediaries would have an obligation to take down the infringing content upon receiving notice i.e., a court order, within the time limit provided

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[48] *UTV Software Communication Ltd. v 1337X.TO* 2019 SCC OnLine Del 8002.

[49] *Disney Enterprises, Inc. v M1 Ltd.* [2018] SGHC 206.

[50] *Myspace Inc. v Super Cassettes Industries Ltd.* 2016 SCC OnLine 6382.

[51] *Shreya Singhal v Union of India* (2015) 5 SCC 1 : AIR 2015 SC 1523.

under the Act and the Rules. Thus, the distinction between active and passive intermediaries is maintained even in the case of copyright infringement. If the intermediary is an active one, it cannot claim safe harbor, however, if it is a passive intermediary, it has to comply with the take down conditions laid down in ***Shreya Singhal***[52] and in ***Myspace v Super Cassettes***[53] In several cases, such as ***Rakesh Kumar Mehta***[54]***,*** intermediaries have also been directed to reveal the identity of the person uploading the infringing content.

Recent challenges that have arisen in the case of intellectual property rights violations explore whether intermediaries and search engines such as Google or Facebook can be directed to remove infringing or illegal content on a global scale. The conflict between injunctions that operate on a national level and those that operate on a global level has been highlighted in ***Google v Equustek Solutions***[55]***,*** where the Supreme Court of Canada had granted an injunction against Google directing it to take down counterfeiting products from its global website. This order of the Supreme Court was challenged by Google in the District Court in California, wherein a stay was obtained against the operation of the said injunction. In India, this issue was decided in ***Swami Ramdev v Facebook***[56], wherein it was held by the Delhi High Court that if the initial cause of action i.e., the initial uploading of the illegal infringing content takes place from India, then Indian courts would be fully empowered to direct global takedown. Although the said order is under appeal, it continues to be in operation. The observations of the Court are as under:

> "74. The question that has arisen in the present case is what would constitute removal or disabling access within the meaning of Section 79. Can removal or disabling access be geographically limited or should it be global?
>
> …
>
> *76. All the platforms i.e. Facebook, Google, YouTube and Twitter argue in one voice that they are intermediaries under Section 79. A perusal of their written statements shows that they claim that they do not either initiate, select or modify the transmission, and that they observe due diligence. Thus, sub-sections (1) and (2) of Section 79 are relied upon by the platforms.* However, in order to avail of the exemptions provided under Sections 79(1) and (2), the intermediaries

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52 ibid.

53 *Myspace* (n 50).

54 *Rakesh Kumar Mehta v Dushyant Kumar* 2018 SCC OnLine 7817 : (2018) 74 PTC 391.

55 *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34 : (2017) 1 SCR 824.

56 *Swami Ramdev v Facebook* 2019 SCC OnLine Del 10701 : AIR 2020 (NOC 529) 173.

have a duty to "expeditiously remove or disable access". The intermediaries have to remove or disable access to "that material". The said material would be the information or data "residing in or connected to a computer resource". What would be the material to which access is to be disabled or expeditiously removed? The answer to this is in the 2011 Rules. Under Rule 3(2), the information or data which constitutes "that material" would be 'the material or information that is grossly harmful, harassing, blasphemous, defamatory.... or otherwise unlawful in any manner whatsoever '. Thus, the access would have to be disabled to any material or information which falls in any of these categories from (a) to (i). If a material or information falls in this category, upon receiving a Court order, the intermediary has to remove expeditiously or disable access to the same.

77. From which locations is the removal or disabling to take place? The answer to this is again in Section 79(3)(b). The removal or disablement to the offending material has to take place "on that resource". What constitutes "that resource"? It is a computer resource in which the "information, data or communication link" is "residing in" or is "connected to".

78. Computer resource is defined as a computer, a computer system or a computer network. It is not merely a single computer. It encompasses within itself a computer network, which would include a maze or a network of computers. Such a computer network could be a global computer network. Thus, a proper reading of Section 79(3)(b) would mean that if any information, data is residing in or connected to a computer network, i.e. a computer resource, the intermediary has to remove or disable access to the said information or data on that resource. The use of the words "that material" and "that resource" shows that the same is intricately connected to the initial part of the provision which deals with "any information, data or communication link" and "a computer resource." Thus, if any information or data has been uploaded or is residing in a computer resource i.e. a computer network, the information or data which has to be removed or disabled from that very computer resource or network. The computer resource in the initial part of the Section is the same computer resource as used in the later part of the Section. The latter resource cannot be a sub-set or a species of the former. It has to be the entire computer resource which was initially connected when the uploading of the information or data took place. Thus, if an information or data has been uploaded on a computer network, the platforms would be bound to remove it and disable it from that computer network completely. Any other

> interpretation of Section 79(3)(b) would not give proper meaning to the use of the words "that material" and "that resource".
>
> *79. Thus, the removal and disablement is intricately connected to the information that is uploaded and the system upon which it is uploaded, where it resides.*
>
> *80. There is no doubt that when the uploading of information or data takes place by a user upon any computer resource of these platforms, the same is made available on a global basis by the platforms.*
>
> *81. The act of uploading vests jurisdiction in the Courts where the uploading takes place. If any information or data has been uploaded from India on to a computer resource which has resulted in residing of the data on the network and global dissemination of the said information or data, then the platforms are liable to remove or disable access to the said information and data from that very computer resource. The removal or disabling cannot be restricted to a part of that resource, serving a geographical location."*[57]

Though the Google judgment extracted above was in the context of a defamation action, the principles laid down therein ought to be equally applicable to infringing content.

The above discussion highlights the manner in which remedies for copyright infringement are being moulded to keep pace with technological developments. The ultimate object and intent of Courts is always to protect the copyright owner. However, the fact that technology is developing at such a fast pace has thrown various challenges on the court system, requiring a recalibration of not merely the remedies, but maybe even the law itself. The Copyright Act has, however, stood the test of time owing to the drafting of the definitions and the various provisions, which have withstood the fast pace of technology.

IV. Fair Use/Fair Dealing

After tracing the evolution of the test of originality and the innovative remedies that Courts have devised to protect copyright, we now come to one of the most vibrant aspects of copyright i.e., 'fair use' and 'fair dealing'. The concept of 'fair use' and 'fair dealing' is as important as the exercise and the protection of the right itself. While providing remedies for infringement

[57] ibid [74], [76]-[81].

protects the rights of owners, 'fair dealing' protects the rights of the public. 'Fair dealing' also indirectly permits wider dissemination of a work which authors, lyricists, composers and artists crave for as it not only spreads their work to a larger segment but also gives them name and fame. It is through 'fair dealing' and fair dissemination that members of the public get to know about the work which in turn helps artists in earning their living.

The manner in which the copyright industry functions today is that after the initial assignment/licensing of the work by the artists/authors, it is the publishing company that earns the monetary revenues. Amendments made in 2012 to the Copyright Act, 1957 were actually a result of this dynamic in the industry. The 2012 Amendments made it compulsory to share a part of the royalties with the authors on a continuing basis.[58] However, it is due to 'fair dealing' on mainstream media and online platforms that the public usually becomes aware of the author and the talent of the author, resulting in invitations for artists, singers, performers etc. to give live performances. These live performances in fact form the main basis of the livelihood of authors and artists. Thus, 'fair dealing' is not unidimensional but multidimensional in that it is to be viewed from the point of view of all three stakeholders viz., the authors, the public and the owners.

The terms 'fair use' and 'fair dealing', though having a nuanced distinction, are used almost synonymously. While the jurisprudence in the United Kingdom is built on 'fair dealing', in the United States of America, it is known as 'fair use'.

The US Supreme Court in 1985 declared in ***Harper Row***[59] "*take not from others to such an extent and in such a manner that you would be resentful if they so took from you*." In the US, as per the settled legal position, the question of 'fair use' is adjudged on the following four factors:

(i) the purpose and the character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work.

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58 See provisos of Section 18, clauses 19(8)-(10) of Section 19 and proviso to Section 38A, as inserted by Act 27 of 2012.

59 *Harper Row Publisher Inc. v Nation Enterprises* 1985 SCC OnLine US SC 129 : 85 L Ed 2d 588 : 471 US 539 (1985).

Along with these factors, the doctrine of 'fair use' has also been merged with the legal maxim *'de minimis non curat lex'* meaning that if the usage is *de minimis*, no legal right would be violated. According to Prof. David Nimmer, the above four 'fair use' factors are extremely malleable and there is no discernible trend in the judicial decisions which he analysed in his article - *'Fairest of Them All and Other Fairy Tales of Fair Use'*[60].

Thus, in the US the above factors which form part of Section 107 of Title 17 of the United States Code are the basis on which 'fair use' is tested. Though these look like objective tests, they are actually extremely subjective and the decision as to whether a particular use is fair or not depends largely on facts.

In the United Kingdom, the Copyright Act, 1988 uses the term 'fair dealing' and not 'fair use'. It is perceived that the doctrine of fair dealing is narrower than that of 'fair use'. It is dealt with under Chapter 3 of the Copyright Act, 1988 and various exceptions for the purposes of private study, research, educational purposes, use in libraries and archives etc. are provided for. The fundamental pre-condition to invoke the concept of 'fair dealing' is that the use has to be non-commercial in nature. ***Hubbard v Vosper***[61] was a celebrated judgment of the Court of Appeal, wherein Lord Denning speaking for the Bench, observed that it is impossible to define 'fair dealing' and that it is a question of degree. It was held that criticism and review are to be interpreted broadly. Thus the expressions used in Section 52, i.e. criticism, review, current events etc. are to be liberally construed under UK law.

In ***Hyde Park Residence***[62]**,** which involved the use of two photographs of Lady Diana, the Court rejected the 'fair dealing' defence and held that the publication of some photographs by a tabloid would constitute giving honour to dishonour and that the use was excessive on the basis of whether a 'fair-minded person' would have dealt with the said work as such. Later on, in ***Fraser-Woodward***[63], which concerned photographs of the Beckham family, the Court held that 'fair dealing' was a matter of impression.

The Indian statute embodies the doctrine of 'fair dealing' under Section 52. The said section contains numerous provisions from 52(1)(a) to (1)(zc) which itself shows the significance and importance attached to fair dealing in India. The concept of fair dealing has been dealt with in various case laws

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60 David Nimmer, ' "Fairest of Them All" and other Fairy Tales of Fair Use' (2003) 66 (1) Law and Contemporary Problems 263.

61 (1972) 2 QB 84 : (1972) 2 WLR 389.

62 *Hyde Park Residence Ltd. v Yelland* (2001) Ch 143; (2000) 3 WLR 215 : [2000] RPC 604.

63 *Fraser-Woodward Ltd v British Broadcasting Corpn.* [2005] EWHC 472 (Ch).

in respect to literary works, artistic works, computer programmes, musical works and sound recordings etc. The jurisprudence of fair dealing in India has developed over the years, keeping in mind the social and cultural character of the society. The various provisions also reflect this feature, where for example, it permits playing of copyrighted works in religious and community functions and ceremonies or for the benefit of religious institutions[64].

If a copyrighted work is used for private or personal use, including research, it is fair dealing.[65] Criticism of the work, review of the work[66] or use for the purpose of reporting current affairs/current events etc.[67], is also protected. It is also permissible to use parts of a work to criticize or review some other work. Transient or incidental storage would not be infringement.[68] If a work is used for the purpose of judicial proceedings, it is exempt.[69] Reproduction of public works, such as works of any legislature or a judgment of a court or a tribunal, reports of committees, councils, boards which are public bodies etc – being works in the public domain, reproduction of the same would not be infringement.[70] Use for the purposes of giving instructions or in the course of teaching or for the purpose of answering questions in an examination or in the activities of an educational institution would also be fair dealing.[71] Playing of a sound recording within a residential complex or a club or similar organization is permissible, so long as it is non-commercial in nature.[72] Reproduction of a part of a work as part of reporting in a newspaper, magazine etc. on any current issue is completely permissible.[73] Storing of a work by a non-commercial library is not an infringement if the library has a hard copy of the work and the same is converted into an electronic copy.[74] Libraries are also permitted to make three copies of a book which is part of their collection, if the book is otherwise not available for sale.[75] There are several such provisions in Section 52, which permit 'fair dealing'. Specific provisions have been made to permit use by persons with disabilities[76] and performance of works in official ceremonies[77] is also not infringement.

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64 Copyright Act 1957, ss 52(1)(l) and 52(1)(za).
65 Copyright Act 1957, s 52(1)(a)(i).
66 Copyright Act 1957, s 52(1)(a)(ii).
67 Copyright Act 1957, s 52(1)(a)(iii).
68 Copyright Act 1957, ss 52(1)(b) and 52(1)(c).
69 Copyright Act 1957, s 52(1)(d).
70 Copyright Act 1957, s 52(1)(q).
71 Copyright Act 1957, s 52(1)(i).
72 Copyright Act 1957, s 52(1)(k).
73 Copyright Act 1957, s 52(1)(m).
74 Copyright Act 1957, s 52(1)(n).
75 Copyright Act 1957, s 52(1)(o).
76 Copyright Act 1957, s 52(1)(zb).
77 Copyright Act 1957, s 52(1)(za).

While the provision itself is quite extensive, cases which have dealt with 'fair use' and 'fair dealing' and the tests evolved therein are even more vibrant. One of the earliest judgments of the Lahore High Court in 1934 was ***Kartar Singh***[78], wherein the Defendant, who was a Granthi at the Golden Temple in Amritsar had written a live sketch on the tenth guru of the Sikhs, Shri. Guru Gobind Singh and given it the name 'Dashmesh Parkash'. The copyright in the book, which was in Punjabi poetry, was transferred to the Plaintiff and one of the clauses in the said contract was that the author and his legal heirs would have no right to get the book printed in any language or alter its subject matter or change its name. The assignment took place in 1915, and in 1917, the author started writing a series of books called Akali Jot on various Sikh gurus. The same was published in 1920. One of the books in the series of Akali Jot was 'Dashmesh Partap'. The argument of the Plaintiff was that Dashmesh Parkash and Dashmesh Partap were one and the same book and the Defendant ought not to be allowed to publish the same. The case of the Defendant was that Akali Jot was completely different from the book for which copyright was assigned to the Plaintiffs and that it was an outcome of independent research and labour. The Trial Court had decreed the suit, which then came in appeal before the Lahore High Court. The Court held that under the guise of copyright, the frontiers of human knowledge cannot be curtailed. Avenues for research and scholarship ought to be permitted. The Defendant/author agreed to change the name of the book and the Court accordingly allowed him to publish the book with the changed name.

In ***Blackwood & Sons***[79], the Court was dealing with the Imperial Copyright Act of 1911. The Plaintiffs - Macmillan & Co. claimed copyright in two works, one authored by Thomas Hardy and the second by Rabindranath Tagore. Defendants were publishers in Madras. The work of the Plaintiff - 'Stories from Tagore' was published as a textbook for the intermediate examination (pre-university exam) and the Defendant published a guide to the said textbook. In the process of publishing the guide, the Defendants had used substantial parts of the original work. The case of the Defendants was that the use of the copyrighted work – 'Stories from Tagore' for the purpose of the guidebook constituted 'fair dealing'. The court firstly held that the Imperial Copyright Act, 1911 as modified by the 1949 Act would govern the rights of parties. On 'fair dealing' the Court summarized the questions as under:

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78 *Kartar Singh Giani v Ladha Singh* 1934 SCC OnLine Lah 277 : AIR 1934 Lah 777.

79 *Blackwood and Sons Ltd. v A.N. Parasuraman* 1958 SCC OnLine Mad 62 : AIR 1959 Mad 410.

> *"The questions to be considered are: (1) is there a reproduction of a substantial part of the copyright work" quantitatively and (2) what is the quality of the work abstracted and does it constitute a valuable portion of the copyright work."*

The Court then embarked on a calculation of the words which showed that out of 1,64,000 words in the original work, 4000 words were copied insofar as the Thomas Hardy work was concerned. In respect of the contention that the Defendant's work did not compete with the Plaintiff's work, the Court held that whether the work is in competition or not is only one of the factors that is to be considered. Though there may be no intention to compete, but the Defendant's intention is not relevant and thus in respect of Thomas Hardy's work, the Court held that there is infringement of copyright.

Insofar as 'Stories from Tagore' was concerned, the Court held that even the translated works enjoyed copyright protection except one story. The court after examining the quantum of content copied i.e., 6543 words out of 42264 words (about 15%), held that the defendant would still violate the Plaintiff's rights. The two points urged by the Defendant that there has to be an intention to compete and that the motive of the infringer should be unfair, were rejected. On the quantum that can be used for the purpose of 'fair dealing', the Court holds that the user must use its 'best judgment'. The mere fact that the Defendant's book does not compete with the Plaintiff's does not put to rest questions as to 'fair dealing'. Accordingly, permanent injunction was granted against the infringement of copyright.

The Madras High Court judgment was rendered by a Single Judge – Justice Rajagopala Ayyangar, who thereafter authored the Ayyangar Committee Report, which reformed Indian Patent Law. Unlike the view of Justice N. Rajagopala Ayyangar, later courts including the Division Bench of Jammu & Kashmir and Justice K. Ramaswamy in the Madras High Court itself, took a different view in the context of guidebooks. In ***Romesh Chowdhry***[80], the Jammu & Kashmir High Court quashed a criminal complaint at the instance of a proprietor of a press who had published notes on textbooks which were prescribed by the University. Reliance was placed on the decisions of the Madras High Court in ***E.M. Forster***[81] and Lahore High Court in ***Kartar Singh***[82], as also of the Allahabad High Court in ***S.K. Dutt***[83] and

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80 *Romesh Chowdhry v Ali Mohamad Nowsheri* 1965 SCC OnLine J&K 1 : AIR 1965 J&K 101.

81 *E.M. Forster v A.N. Parasuram* 1964 SCC OnLine Mad 23 : AIR 1964 Mad 331.

82 *Kartar Singh* (n 78).

83 *S.K. Dutt v Law Book Co.* 1953 SCC OnLine All 286 : AIR 1954 All 570.

Privy Council in ***Macmillan***[84] to hold that the notes which were published by the press explain the significance and meaning of the quotations in the textbooks of the complainant. Once a book is published by a University, in the strict sense, there cannot be copyright and any member of the public could publish a review, or a criticism of guidebooks. The court goes to the extent to hold that if a book becomes a textbook it becomes public property.

The judgment in ***Blackwood & Sons,***[85] can also be clearly contrasted with two judgments of the Delhi High Court in ***University of Oxford v Narendra Publishing House***[86] and ***University of Cambridge v B.D. Bhandari***[87]. In both these judgments, in the context of guidebooks being published for Maths and English textbooks, the Court held that the use by the Defendants was 'transformative' in nature and thus amounted to 'review' under Section 52.

The Delhi High Court's view was taken by a Division Bench headed by Justice A.K. Sikri, who unlike Justice Ayyangar, rejected the test of US law on 'fair use' as being not very useful, and borrowed the concept of 'transformative use' from American jurisprudence to recognize originality even in a guidebook and hence holding it to be non-infringing. The Division Bench of the Delhi High Court interestingly, reversed the Single Judge's view on 'originality' in ***University of Oxford v Narendra Publishing House***[88] and held that the questions contained in the textbooks at the end of each chapter were original and qualified for copyright protection. However, the Court permitted the publication of the guidebooks on the ground that they constitute 'transformative use'.

In the context of education, the next judgment that is of significance is ***University of Oxford v Rameshwari Photocopy Services***[89]- wherein the Division Bench of the Delhi High Court held that the publication of course packs, which were compilations of different books prescribed in the syllabus, constituted 'fair dealing' under Section 52(1)(i) of the Copyright Act.

A review of all these judgments shows that in the context of education, in recent times, Courts tend to tilt in favour of allowing publication of guides, photocopying etc. as the Courts' approach is driven from the point of view of the students and not the owners. The judgments also have an underlying

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84 *Macmillan and Co. Ltd. v K. and J. Cooper* 1923 SCC OnLine PC 59 : AIR 1924 PC 75.

85 1958 SCC OnLine Mad 62 : AIR 1959 Mad 410.

86 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

87 2011 SCC OnLine Del 3215 : (2011) 47 PTC 244.

88 2008 SCC OnLine Del 1058 : (2008) 38 PTC 385.

89 *University of Oxford v Rameshwari Photocopy Services* 2016 SCC OnLine Del 5128 : (2016) 68 PTC 386.

philosophy that for the purpose of education, access is crucial and if text-books are over-priced, publication of guidebooks and course packs ought to be permitted. Thus, the effort of copyright owners ought to be to make copyrighted books reasonably priced and made accessible for the larger mass of students, in order to avoid violations, such as photocopying and other publications using parts of copyrighted works.

Apart from literary works, the concept of fair dealing and fair use has been severely debated in the context of the broadcasting industry as well. In ***Super Cassette v Bathla Cassette***[90], the Plaintiff who had made a version recording of an original sound recording, could not obtain an injunction against another company publishing a version recording of the Plaintiff's version recording. Section 52(1)(j) as it then existed under the Copyright Act was interpreted. The said provision now stands repealed with the 2012 Amendment in the Act.

The question of ephemeral recordings was considered in ***Video Master***[91]*,* by the Bombay High Court which held that the preparation of Betachem cassettes for the purposes of broadcasting on satellites would not be infringement under Section 52(z) of the Act.

In ***ESPN v. Global Broadcast***[92]*,* ESPN had objected to use of footage from cricket matches for the purpose of news broadcast. While balancing the rights of the original broadcaster who had invested huge sums of money in obtaining the right and the right of the news channel to broadcast news, the Division Bench of the Delhi High Court laid down clear tests as to what constitutes 'fair dealing' in the context of broadcasting. The Court approved the test laid down by the High Court of New Zealand in ***Media Works NZ Ltd.***[93] that in order for usage in news to be 'fair dealing', the extract must be brief, and had to be used within 24 hours for it to constitute a current event. It would not be permissible to broadcast full-fledged sponsored programs with advertising under the garb of 'fair dealing'. While reporting of news is protected by Article 19(1)(a) of the Constitution of India, commercial exploitation with sponsored programmes and advertising is not permissible. Repeated use of the broadcast footage would not be 'fair dealing'. The Court finally held that although 'fair dealing' cannot be defined, extensive use in

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[90] *Super Cassette Industries Ltd. v Bathla Cassette Industries (P) Ltd.* 2003 SCC OnLine Del 843 : (2003) 27 PTC 280.

[91] *Video Master v Nishi Productions* 1997 SCC OnLine Bom 454 : (1998) 18 PTC 117.

[92] *ESPN Star Sports v Global Broadcast News Ltd.* 2008 SCC OnLine Del 1385 : (2008) 38 PTC 477.

[93] *Media Works NZ Ltd. v Sky Television Network Ltd.* [2016] NZHC 1883.

direct competition with the copyright owner's broadcast would not be protected by 'fair dealing'.

In ***Super Cassettes v Hamar Television***[94] sound recordings of the Plaintiff were being telecasted on a Bhojpuri channel, wherein the channel pleaded 'fair dealing' on the ground that the usage was of a maximum of 10-30 seconds, that too not in a single stretch and thus would constitute 'fair dealing'. The court followed the judgment in ***ESPN v Global Broadcast***[95], and after reviewing a large number of judgments from the UK on 'fair dealing', held that the exact contours of 'fair dealing' cannot be drawn. Some tests were laid down by the Court, for example 'short extracts with long comments' may be 'fair dealing'; that Courts ought to take a liberal approach as to what constitutes criticism or review; in the context of sound recordings, the standard would be that of a fair minded and honest person, from the viewpoint of a 'lay hearer'; the length and extent of the use would be crucial; public interest and the interest of public is not the same.

After reviewing the amount of usage by the Defendant, the Court held that in order to assess as to what constitutes 'substantial taking' of a work, it is the quality of the work that is important and not the quantity. The court held that even the taking of a single note which forms an essential part of the work could be substantial. Since the Defendant was using the same for running a TV Channel, which constituted commercial purpose, without taking the permission of the Plaintiff, and not for reporting any current events, the 'fair dealing' defence was not recognized by the Court.

This case would be in sharp contrast with the judgment of the Division Bench in ***India TV v Yashraj***[96], wherein the Court was considering use of very small portions of a famous song '*Kajra Re*' and certain other songs during an interview with the singer. The Court applied the 'de minimis test' and held as under:

> *"55. In our opinion, the use of de minimis, as applied in other areas of the law, without any modification or without having any marriage of convenience, has three significant advantages in the field of Copyright Law. Firstly, the Fair Use concept would be a bad theoretical fit for trivial violations. Secondly, de minimis analysis is much easier. Thirdly, a de minimis determination, is the least time consuming, and*

94 *Super Cassettes Industries Ltd. v Hamar Television Network (P) Ltd.* 2010 SCC OnLine Del 2086 : (2011) 45 PTC 70.

95 *ESPN* (n 92).

96 *India TV Independent News Service (P) Ltd. v Yashraj Films (P) Ltd.* (2013) 53 PTC 586.

> *needless to state it is in the interest of the parties as also the society that litigation reaches its destination in the shortest possible time.*
>
> *56. After all, the factors commonly considered by Courts in applying de minimis are well listed. They are five in number: (i) the size and type of the harm, (ii) the cost of adjudication, (iii) the purpose of the violated legal obligation, (iv) the effect on the legal rights of third parties, and (v) the intent of the wrongdoer."*[97]

By applying the tests as laid down above, the Court held that use of a part of a song in a consumer awareness advertisement, was *'de minimis'* usage and the infraction was trivial. In the third usage, the performer who had originally lent her voice to the song was being interviewed on a TV channel, and as part of the interview, she sang portions of the song. The Court held that simply because, she had assigned her rights to the sound recording company, the performer cannot be denuded from using her own excerpts of her performance. In an interview it was common for a celebrity to be asked questions about her well-known works and her singing would be perfectly justified in that context. In the 45 minute program, the total singing was less than 10 minutes and the court held that the same would constitute 'fair use' by applying the doctrine of 'de minimis'.

The Bombay High Court in ***Tips Industries Ltd.***[98] rejected the defence of 'fair dealing', as the Defendants' use was commercial and for the purpose of renting the sound recordings. Such use would not constitute private use or research.

A significant judgment rejecting the defense of 'fair dealing' and 'fair use' in the context of the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007 is the ***Union of India v BCCI***[99] judgment, wherein the Supreme Court narrowly construed the provisions of the said Act as permitting Prasar Bharti to use the live feed received by it only on its own terrestrial and DTH networks and not to Cable Operators. Although this judgment did not deal with the provisions of the Copyright Act specifically, the Mandatory Sharing Act was itself meant to permit use of copyrighted broadcasts in larger public interest to make cricket matches available on Prasar Bharti's wide network. The Supreme Court narrowly construed the

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[97] ibid [55] –[56].

[98] *Tips Industries Ltd. v Wynk Music Ltd.* Comm. Suit IP (L) NO. 114/2018, decided on 23rd April, 2019.

[99] *Union of India v Board of Control for Cricket in India* (2018) 11 SCC 700 : (2018) 73 PTC 31.

Act so as to safeguard the rights of broadcasters and the investment made by them in acquiring broadcasting rights.

In ***Malini Mallya***[100]***,*** the Supreme Court recognized the defence of 'fair dealing' in the performance of Yakshagana ballet dance in an educational institution. The Supreme Court held that Yakshagana ballet, a dance form developed by Dr. Kota Shivarama Karanth, when performed in an educational institute for non-commercial purposes, would not constitute infringement of an order of injunction.

Civic Chandran[101] was also an interesting case where an original drama was criticized by performing a counter drama. The ld. Single Judge of the Kerala High Court held that the counter drama, being for the purpose of criticism, the defence of 'fair dealing' would be applicable.

A review of the case law on 'fair use' and 'fair dealing' shows that though there are some broad principles, decisions are very case-specific. The experiences of judges and their own personal philosophies have had an impact on the judgments, especially in the context of education. However, broadly, Courts have upheld the defence of 'fair use' and 'fair dealing', with some exceptions. Clear commercial use is not protected, transformative use is recognized, and fair dealing cannot be unshackled and uncontrolled, as it has to be within the four corners of reasonableness, bona fide use, non-commercial use and *de minimis* use.

For any use to constitute fair use, only that quantum of the work as is needed must be used. 'Fair use' and 'fair dealing' are exceptions to the rule and hence they have to be construed narrowly and not broadly. The statute itself permits a large variety of 'fair use' and 'fair dealing' measures. Criticism, review, etc. has to be genuine and not merely a charade. The depth/strength of criticism is not a measure, so long as it constitutes criticism.

V. Conclusion

The evolution of case law in the realm of copyright on the principles of originality, innovative remedies and 'fair dealing' shows that they have been moulded to the needs of Indian society, including India's social and cultural context. Indian Courts have maintained the balance between protection afforded to copyrighted works and permitting 'fair dealing' in the larger

100 *Academy of General Education v B. Malini Mallya* (2009) 4 SCC 256 : AIR 2009 SC 1982.

101 *Civic Chandran v C. Ammini Amma* 1996 SCC OnLine Ker 63 : (1996) 16 PTC 670.

interest of the public. The remedies that have been ingenuously crafted to protect copyright owners also show that Courts have risen to the challenges thrown up by technology. The law on copyrights, as multi-faceted as it is, would continue to grow with the advent of digital technologies that have enabled further dissemination of copyrighted works.

EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review

*Peter Alexiadis and Zuzanna Bobowiec**

I. Introduction

A growing discontent has spread over the past few years that large digital platforms are putting themselves in a position of unassailable market power through their many acquisitions of fledgling companies that offer niche digital products or services.[1] In doing so, the oft-recurring allegation is that

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1 Refer to, *inter alia*, Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (March 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed ; Heike Schweitzer and others, *Modernising the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)*, (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742> accessed; Jason Furman and others, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019) 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>accessed; Elena Argentesi and others, *Ex-post Assessment of Merger Control Decisions in Digital Markets* (9 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf> accessed; Fiona Scott Morton and others, *Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee* (May 2019) <https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf> accessed; Letter from the Dutch State Secretary of Economic Affairs and Climate (May 2019) < https://www.government.nl/documents/letters/2019/05/23/

these large digital platforms take advantage of their scale and scope, larger and more varied data collections, and direct and indirect network effects, thereby making their offerings irresistible to consumers and erecting barriers to switching for consumers. By doing so, the narrative proceeds, the digital markets affected become uncontestable as they 'tip' in favour of the serial acquiring digital platform, thereby creating a 'winner takes all' situation in those some markets.[2]

The origins of concern about such 'killer acquisitions' stem from a study conducted in the wake of a series of mergers in the pharmaceutical sector, the net effect of which was said to be the loss of innovation, the raising of prices of key pharmaceutical products and the loss of choice for consumers.[3] According to a body of expert opinion, large pharmaceutical companies had engaged in a systematic policy of acquisition of smaller potential rivals with a view to ensuring that their pipeline products would not enter the market and upset the acquiror's monopoly with respect to certain patented drugs.

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future-proofing-of-competition-policy-in-regard-to-online-platforms> accessed; Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (June 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed; Competition Authorities Working Group on Digital Economy, 'BRICS in the Digital Economy: Competition Policy in Practice' (18 September 2019) <http://en.fas.gov.ru/documents/documentdetails.html?id=15348> accessed; Autoridade da Concorrencia, *Digital Ecosystems, Big Data and Algorithms* (July 2019) <http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf> accessed; *Joint Memorandum of the Belgian, Dutch and Luxembourg Competition Authorities on Challenges Faced by Competition Authorities in a Digital World* (2 October 2019) <https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdlcl.joint_memorandum_191002.pdf> accessed; Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" (5 June 2019) <> accessed ; Italian Competition Authority, the Data Protection Authority and the Telecommunications Regulator, 'Big Data Joint Survey: Guidelines and Policy Recommendations' (July 2019) < accessed; Japan Fair Trade Commission, 'Outline of Interim Report Regarding Trade Practices on Digital Platforms' (April 2019) <> accessed; Stigler Center for the Study of the Economy and the State, 'Stigler Committee on Digital Platforms: Final Report' (2019) <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>accessed; Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed.

2 As regards the characteristics of the digital markets and their ability to easily 'tip' into monopoly because of network effects, refer to discussion in OECD, *The Digital Economy* (2012) 8 <http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf> accessed.

3 The term '*killer acquisition*' was originally coined in the study of Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129(3) Journal of Political Economy 649 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed.

Those acquisitions went largely unscrutinised as the relatively low turnovers of targets at their initial stages of R&D and product formulation meant that the deals fell below the merger control radar of jurisdictions around the world, including the European Union ('EU'). In a similar vein, the loss of potential competition led to a series of competition law infringement actions against dominant pharmaceutical firms that were keen to prevent competition from generic drug manufacturers wishing to enter the market upon the expiry of their drugs.[4]

Seen in this light, the dilemma faced by competition policymakers is twofold.

First, there has been widespread concern that so many of these so-called 'killer acquisitions' fall outside merger control scrutiny because the size of the target in terms of existing revenues is so low that traditional merger thresholds are not satisfied. Critics therefore argue that it is bad public policy to systematically allow mergers capable of generating serious anti-competitive effects on digital markets to be realised, without at least some level of effective scrutiny. To this end, consideration needs to be given to creating new legal thresholds which would allow for the more widespread review of killer acquisitions in the digital space.[5]

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4 This has been the case in the recent surge in the European Commission's Decisions and European Court's Judgments regarding the so-called 'pay-for-delay' arrangements in the pharmaceutical sector. See Case C-307/18 *Generic (UK) Ltd and Others v Competition and Markets Authority* [2020]; Case C-591/16 P *H Lundbeck A/S and Lundbeck Ltd v European Commission* [2021], Case C-176/19 P *Servier and Others v Commission* [2019] OJ C139/37; Case C-201/19 P *Servier and Others v Commission* [2019] OJ C139/39. With the benefit of hindsight, the European Commission has been able to identify 19 acquisitions in the pharma sector in the period 2009-2017 which were problematic in terms of their adverse effects on potential competition (i.e., their potential to increase prices, diminish the number of available medicinal products and hinder innovation). Refer to European Commission, 'Competition Enforcement in the Pharmaceutical Sector (2009-2017)' (2019)14 <https://ec.europa.eu/competition/publications/reports/kd0718081enn.pdf> accessed.

5 According to Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment'(2019) DIW Berlin Discussion Paper 19, 60% of acquisitions made by digital providers such as Amazon, Facebook, and Google were of firms that were less than four years old. In addition, it is estimated that the five largest global digital firms have acquired in excess of 400 companies over a period of ten years; see Furman and others (n 1) 12. In turn, the *Lear Report* concluded in 2019 that, since 2008, Google had bought over 168 companies while Facebook had bought 71, with many of the acquisitions being deemed to be potential competitors; see Argentesi and others, 'Ex-Post Assessment of Merger Control Decisions in Digital Markets' (n 1) 10. Refer also to the announcement by the Federal Trade Commission of the United States to the effect that it intended to examine past acquisitions by large technology companies (2020)<https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed.

Second, there has been a significant level of debate as to whether, even where merger thresholds have been triggered, existing legal standards of review for those mergers are not appropriate for changes in market structure in the digital sector, given the uneven nature of market developments driven by technological innovation and radical shifts in business models. Accordingly, some critics have argued that existing legal standards of review should be diluted or modified in order to facilitate the task of the merger review body, either in general terms to cover all mergers or more specifically with respect to digital sector mergers. The central idea underpinning such changes to the substantive test for review is that merger regulators should be more concerned about letting potentially anti-competitive mergers escape a prohibition sanction than about engaging in excessive intervention.[6]

Judged primarily from the perspective of the merger regime prevailing in the EU, we consider below the various pros and cons in the proposals for change in relation to jurisdictional thresholds and substantive tests of review that might be adopted for digital sector mergers.

II. Pharmaceutical v. Digital Sector Mergers

In order to better understand the implications of what would constitute a 'killer acquisition' in the world of digital markets, we are inspired by the particular implications of that expression that has originated in the context of pharmaceutical sector mergers.

In their widely acknowledged study of the US pharmaceutical sector, Cunningham *et al* identify a 'killer acquisition' as one where the acquiring firm's strategy is "*to discontinue the development of the targets' innovation projects and pre-empt future competition*."[7] The theory of harm behind such an acquisition would focus on the incumbent firm acquiring an innovative firm which it would subsequently shut down, thereby 'killing' the manufacture of a product that poses a potential threat to its established product

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6 Until this very recent re-examination of whether it is better to err on the side of under-enforcement than over-enforcement, competition enforcement policy had for decades preferred to opt for the under-enforcement option on the ground that 'Type 1 errors' (i.e., the risk of over-enforcement) are more pernicious, as they would prevent innovation, with the assumption being that 'Type 2 errors' (i.e., the risk of under-enforcement) will usually be capable of being quickly corrected through the growth of new rivals. See also OECD, 'Start-ups, Killer Acquisitions and Merger Control – Background Note' (2020) <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed ; OECD, 'Start-ups, Killer Acquisitions and Merger Control' (2020) <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed.

7 Cunningham, Ederer and Ma (n 3) 1.

line.[8] In the alternative, the acquiror might kill-off its own internal efforts to develop a competing product in order to remove a potential risk to the newly acquired product.[9] Under both scenarios, there is a net welfare loss to society. The authors concluded that approximately 6% of all acquisitions in the pharmaceutical sector have resulted in the discontinuation of competing innovative projects, which has in turn accounted for approximately fifty acquisitions per annum.[10] While this number may not seem high in absolute terms, its relative importance is said to be magnified by the range of potential consumer and wider societal benefits that might otherwise have occurred in the absence of the acquisitions. Given that the pharmaceutical sector is characterised by drug prices which are often volatile and where price spikes are not uncommon, one can understand the public policy concerns surrounding innovation loss as a likely outcome of a merger, especially where enduring high prices under quasi-monopoly conditions might prevail.

The findings of the Cunningham study make much good sense in a sector which is characterised by absolute patent monopoly for a finite period of time (usually twenty years),[11] where the various stages of development of a 'pipeline' product are well understood and clearly structured[12] and where

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8 Refer to KJ Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau of Economic Research (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962).

9 Such a transaction is referred to by some economists as a 'reverse killer acquisition'. In such cases, the incumbent acquires a smaller company in order to escape the process of putting in the innovative effort itself. It has been demonstrated that established incumbent operators in competitive spaces such as high tech, digital payments, the Internet and pharma, have acquired special features, functionalities and even businesses with a view to cut down on the time and the level of effort that would otherwise be required to sustain a successful commercial product or service through organic expansion. This type of analysis figured prominently in the UK Decisions of the CMA in ME/6766/18 *Paypal/iZettle* [2019], ME/6806/19 *Sabre/Farelogix* [2020], and most recently in ME/6836/19 *Amazon/Deliveroo* [2020], where the CMA's competition concerns included whether or not the acquisition allowed the buyer to forego its own efforts in the area of specialisation of the target, thereby eliminating the prospect of future competition (in the latest case, the concern was that Amazon would compete less aggressively and have fewer incentives to improve its own online convenience groceries following the merger with Deliveroo). In this regard, see Cristina Caffarra, Gregory Crawford and Tommaso Valletti, '"How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions' (*Competition Policy International*, 26 May 2020) <https://www.competitionpolicyinternational.com/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/> accessed.

10 Cunningham, Ederer and Ma (n 3) 6.

11 According to the Convention on the Grant of European Patents 1973 (European Patent Convention) art 63, the maximum term of a European patent is 20 years from its filing date. The patent may lapse earlier following opposition proceedings, or, may be extended in certain circumstances in the case of medical or plant protection product patents.

12 The regulation of so-called 'pipeline products' – pharmaceutical products under development - requires the monitoring of the new drug's progress through a drug development and approval process necessitating the publication of the product's details. For recent European

the abrupt loss of an absolute monopoly right overnight raises obvious issues about the level of potential competition likely to be generated by potential market entry prompted by generic producers.[13] In such circumstances, shutting down a fledgling competitor could allow an incumbent firm to extend its patent monopoly artificially.

However, these conditions are unlikely to arise in the case of most digital sector mergers. In these cases, it is much more likely that the acquisition will be motivated by the desire to develop the services of the start-up target firm, rather than shutting them down. Moreover, the preference will inevitably be to integrate the target's services into the broader 'ecosystem' which sustains the acquiror's existing services platform. The theory of harm underpinning such an acquisition will therefore in most cases be vastly different from the usual killer acquisitions identified in the pharmaceutical sector, given that the integration of innovative complementary services often has a much clearer rationale in the digital services sector in terms of its ability to generate efficiencies. In digital market cases, assessing the likely theory of harm is therefore a much more complex exercise, given that product development is less structured and the pace and success of innovation is much more problematic. While the threat of generic drug entry in the pharmaceutical industry can be clear and calculable, it can be anything but scientific determining which innovations in high-tech fields might constitute a genuine competitive threat and which others might be little more than a noble (or ignoble) marketplace failure.[14] Many mergers in the telecommunications sector in

Commission decisional practice requiring divestitures in early pipeline products in order to protect potential innovation, refer to *Novartis/GlaxoSmithKline Oncology Business* (Case M.7275) [2015]; *General Electric/Alstom* (Case M.7278) [2015] OJ C139/6.

13 The threat of generic drug entry to an incumbent firm's profits became clear following the disclosure of the amounts and the disproportionate nature of the recently considered pay-for-delay payments. For recent commentary see Peter Alexiadis and Pablo Figueroa, 'Mixed Messages in the "By Object" vs "By Effects" Saga: The Enigma of Lundbeck' (*Competition Policy International*, February 2018) <https://www.competitionpolicyinternational.com/mixed-messages-in-the-by-object-vs-by-effects-saga-the-enigma-of-lundbeck/> accessed; Bill Batchelor and others, 'Lundbeck Raises More Questions than Answers on "Pay-for-Delay" Settlements; Creates Damaging Divergence from US Law' (2017) 38 European Competition Law Review 3; Sandra Marco Colino and others, 'The Lundbeck Case and the Concept of Potential Competition' [2017] Concurrences 24; Romano Subiotto and Jacopo Figus Diaz, '*Lundbeck v Commission*: Reverse Payment Patent Settlements as Restrictions of Competition by Object' (2017) 8(1) Journal of European Competition Law & Practice 27.

14 Even in the pharmaceutical sector, it was calculated that only 3.6% of projects would have been preserved by a prohibition on 'killer acquisitions', given the existing failure rates for new drugs; only 14% of all drugs involved in clinical trials result in approvals from health authorities. See Conor Hale, 'New MIT Study Puts Clinical Research Success Rate at 14 Percent' (5 February 2018) <https://www.centerwatch.com/articles/12702-new-mit-study-puts-clinical-research-success-rate-at-14-percent#:~:text=New%20MIT%20Study%20Puts%20Clinical%20Research%20Success%20Rate%20at%2014%20

Europe, for example, rather than being driven by any desire to foreclose new entry, were characterised for a significant period of time after liberalisation in the early 1990s by a wave of acquisitions across delivery platforms precisely because investors were uncertain as to which delivery platform would be in the ascendancy in the longer term.[15]

Accordingly, when applied to the digital sector, the expression 'killer' acquisitions could just as readily refer to the acquisition of nascent firms, the competitive significance of whose products or services might be highly speculative.[16] In circumstances where more apps fail than succeed commercially, it will be exceedingly difficult for a merger review authority to predict with any degree of certainty what is likely to be the competitive outcome of a digital sector merger in such circumstances. While a true 'killer' acquisition would almost certainly harm consumer welfare by depriving the market of innovative alternatives, it is far more difficult to arrive at the same conclusion about acquisitions of nascent competitors in the tech space, many of which undoubtedly enhance consumer welfare in a number of respects by expanding the distribution of innovative products. This can be achieved *inter alia* by the addition of newly acquired features, applications and functionalities to existing services. By contrast, a theory of harm based on the loss of potential competition would in principle be more readily available in the case of the pharmaceutical sector where there exists a strong possibility that the acquired product or service would grow into a rival product or service of the acquiror, thereby removing the competitive threat posed by the acquired product or service.[17] Thus, whereas theories of harm usually associated with the pharmaceutical sector are built on concerns about restrictions in supply which lead to potential rises in price (i.e., a form of 'unilateral effects' theory of harm), theories of harm in digital market mergers will invariably turn on whether potential expansions in supply will exacerbate existing economies

Percent,-February%205%2C%202018&text=Nearly%2014%20percent%20of%20all,MIT%20Sloan%20School%20of%20Management> accessed. Moreover, as has been pointed out elsewhere, besides the fact that R&D in the digital sector is less structured than the world of pharma and is thus not contingent on extensive and clear R&D phases, it is also the case that many digital products are replicable, which renders them obsolete within a few years. Refer to Mats Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' 2018 Yearbook of the Finnish Competition Law Association 19.

15 By way of example, refer to the various acquisitions of stakes in telecommunications companies by Microsoft in the 1990s, including AT&T ($5 billion), Comcast ($1 billion), Titus in Japan ($950 million), Korea Telecom ($500 million), United Pan-Europe Comm NV ($300 million), NTL ($500 million), TV Cabo Portugal SA ($38.6 million), and Telewest ($5 million). More recently, other deals have included mergers involving Ericsson, Skype, and LinkedIn.

16 OECD, Start-ups, Killer Acquisitions and Merger Control (n 6).

17 ibid.

of scale and scope, thereby leading those markets to become incontestable over time.

Accordingly, rather than formulating theories of harm around the loss of potential competition, in the vast majority of cases it will be more appropriate to examine a digital market merger of a start-up digital player by reference to alternative theories of harm, including:

- potential vertical foreclosure concerns in downstream markets through the ability of a party, *inter alia,* to control key inputs in the supply chain;[18] and
- potential conglomerate effects generated by the fact that the acquired products or services are complements to the acquiror's products or services, which might facilitate the tying or bundling of such products or services or which might generate incentives for the merged firm to thwart interoperability.[19]

Consequently, any read-over by policymakers in the approach to "killer acquisitions" in the digital sector from experiences learned from the pharmaceutical sector must be made with great circumspection, especially given that the respective theories of harm associated with acquisitions in these respective sectors are likely to be so different.

III. Proposed Threshold and Notification Adjustments

Even if one concedes that acquisitions of fledging digital firms might be capable of raising serious competition concerns in particular digital markets, the question remains as to which jurisdictional thresholds need to be drawn for merger notifications in order to ensure that effective merger review can occur. Thus far, various reports and commentaries released around the world suggest that a number of alternative approaches might be relied upon to determine when it is appropriate for a merger review body to intervene. For example, the following alternatives have been considered:

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[18] OECD, Vertical Mergers in the Technology, Media and Telecom Sector: Background Note by the Secretariat (2019) <https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf> accessed.

[19] OECD, Roundtable on Conglomerate Effects of Mergers: Background Note by the Secretariat (2020) <https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf> accessed.

- a merger threshold test based on **transaction values**, rather than on the traditional revenue tests used to determine the relative importance of a transaction;
- **mandatory notifications**, based on the market presence of the acquiror, to be determined by reference to a range of potentially different criteria which suggest that the acquiror has some degree of market power;
- specifically in relation to the EU, a re-calibration of the criteria used in the **referral system** pursuant to which a merger is forwarded to the European Commission ("Commission") that would otherwise be subject to reviews in multiple national jurisdictions across the EU; or
- the existence of **residual powers of review** that would permit a merger review body to assess the competitive implications of any merger after its consummation, at least in those well-articulated situations where it is felt that the competitive implications of the merger in question are so serious as to justify such an additional *ex post* review.

Each of these alternative approaches are considered below by reference to criteria such as the need for legal clarity, the proportionality of intervention, and the extent to which material improvements in enforcement policy could be expected from such shifts in jurisdictional powers.

IV. Transaction Values

The most often-touted legal mechanism by which merger agencies could review more digital market mergers lies in the proposal that merger review thresholds can be based on transactional values, usually as a supplement to the prevailing standard of jurisdictional tests based on the historical revenues of the merging parties. In this way, the inconsequential revenues of digital start-ups need not prove to be a bar to merger review if the acquiror sees real potential value in its target. This was one of the key proposals considered in the *Cremer Report*, among others.[20] By the same token, the *Cremer Report* also noted that a jurisdictional transaction value-based test would be likely to create an additional administrative burden on agencies and EU businesses alike, with the result that its application would be likely to be resource-intensive.[21]

[20] Crémer, de Montjoye and Schweitzer (n 1) 113.

[21] ibid 114.

The authors Bourreau & de Streel[22] do not consider that the introduction of such a transaction value standard would dramatically increase the overall volume of notifiable mergers, as merger transaction value is in any event usually closely linked to the turnover of merging firms. Nor do they envisage that such a standard should operate automatically. Rather, they foresee that such an additional jurisdictional test should be applied at the discretion of the merger review body where the high transaction cost is deemed to reflect presumed important revenue streams of the innovative target in the foreseeable future (which might be welfare-enhancing) or the premium that the acquiror is willing to pay to ensure that they have market stability and the ability to generate monopoly rents in the wake of "killing" the innovative technology of the acquired firm.[23] More generally, it is worth noting that there are already a number of jurisdictions which accord transaction value an important role when determining when merger control jurisdiction can be exercised.[24]

At the time of writing, reliance on merger thresholds that are based on transactional values is being explored in India, as reflected in the introduction of a draft *Competition Amendment Bill* in March 2020.[25] The Bill authorises the Competition Commission of India ('CCI') to examine transactions even if the asset or revenue thresholds have not been met. Specifically, Section 6(a) of the new draft law confers power on the CCI, acting in conjunction with the government, to identify *new thresholds* for merger notification that would be required under the *Indian Competition Act 2002*.[26] These may *inter alia* be based on the value or size of the transaction, and should be used in the public interest.[27] The Indian government is conducting a public consultation on the draft Bill, which it describes as "*a forward-looking amendment*".[28] In parallel, a public consultation on the introduction of a "size of transaction" merger threshold, in addition to existing revenue thresholds,

22 See Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (*Centre de Recherche Information, Droit et Société*, 26 February 2019) 32 <http://www.crid.be/pdf/public/8377.pdf> accessed.

23 ibid.

24 Refer to discussion in Peter Alexiadis, Elsa Sependa and Laura Vlachos, 'Merger Control: "Around the World in 80 Days: Management of the Merger Review Process of Global Deals"' (2018) 19(3) Business Law International 201 <https://www.gibsondunn.com/wp-content/uploads/2018/09/Alexiadis_Sependa_-_BLI_-_Merger_Control_-_Around_the_World_in_80_Days.pdf> accessed.

25 The draft Bill is currently undergoing the stage of public consultation ordered by the Indian Government <https://www.cci.gov.in/node/4992> accessed .

26 As required by the Competition Act 2002, ss 5(a), 5(b), 5(c) <https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf> accessed .

27 See the Draft Amendment Bill, s 6(a).

28 See Gireesh Chandra Prasad, 'Competition Commission of India to Get More Teeth to Regulate Tech M&As' (22 February 2020) <https://www.

has been completed in South Korea as of 7 August 2020 by that nation's Competition Authority, the KFTC. Changes to the existing thresholds are due to be adopted by the Korean national assembly following a formal submission by the KFTC. The amended law is expected to come into force as early as the second half of 2020.[29]

In Europe, largely in response to a number of high profile digital sector transactions that have slipped under various merger review powers over the years,[30] both Germany[31] and Austria[32] respectively introduced transaction value tests in 2017 in order to bring 'killer acquisitions' in the digital sector within their respective jurisdictional remits. However, in practice this exercise has brought only a handful of additional mergers within the scope of the German and Austrian mandatory merger filing obligations,[33] with the new thresholds attracting a range of transactions outside the digital sector (i.e., predominantly in pharmaceuticals and the business segment of the real estate sector).[34] An initial overview of the success of the German and Austrian experiences has suggested to the OECD that, given the small amount of transactions caught under the new jurisdictional test, businesses could hardly be said to have borne significant additional costs in terms of regulatory compliance.[35] On the positive side, notes the OECD, the additional cases reviewed may have been successful in deterring any regulatory

livemint.com/politics/policy/competition-commission-of-india-to-get-more-teeth-to regulate-tech-m-as-11582312178757.html> accessed.

29 Refer to Seong Un Yun and others, 'BKL Legal Update-Antitrust 2020-10' (10 June 2020) <https://www.lexology.com/library/detail.aspx?g=a69db1a1-86e6-4f67-b47d-d01f729ed7ff> accessed.

30 Notable mergers that have famously escaped the European Commission's scrutiny include *Facebook/Instagram* and *Google/Waze*. Both were caught only by UK merger control under a 'share of supply test' and subsequently scrutinised by the UK Office of Fair Trading. See UK Office of Fair Trading Case ME/5525/12 *Facebook/Instagram* [2012] and UK Office of Fair Trading Case ME/6167/13 *Google/Waze* [2013].

31 German Act Against Restraints of Competition 2013 as amended by the 9th amendment, sec 35(1a). For German Competition Authority's commentary refer to <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed.

32 Austrian Cartel Act 2005 as amended by the Austrian Cartel and Competition Law Amendment Act 2017, sec 9(4). For Austrian Competition Authority's commentary refer to <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed.

33 Refer to Martin Sauermann, 'The Transaction Value Threshold in Germany - Experiences with the New Size of Transaction Test in Merger Control' (8 October 2019)<https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/> accessed.

34 ibid. The post notes the sectoral distribution of the concerned transaction as being spread between the 'pharmaceutical, chemical and IT industries'. Refer further to OECD, 'Non-price Effects of Mergers – Note by Germany' (25 May 2018) 6-8 <https://one.oecd.org/document/DAF/COMP/WD(2018)12/en/pdf> accessed .

35 OECD,'Start-ups, Killer Acquisitions and Merger Control' (n 6) 44.

'gaming' of the previous turnover-only based notification system by deterring some mergers from taking place. By the same token, the OECD has also considered the possibility that some large digital firms might alter their behaviour by engaging in more speculative mergers earlier on in the innovation cycle of a target firm prior to their valuation reaching the prescribed transactional value thresholds.[36]

In determining whether or not a transaction value test is best suited to address any perceived gap in the review of mergers in the digital sector, the initial stumbling block will be to determine the appropriate transaction value level at which any notification threshold will be set. Given that what constitutes a significantly large transaction value may vary greatly from sector to sector,[37] identifying an appropriate value level may prove to be a thankless task if one goes beyond the targeting of a particular industrial sector. Although one can imagine that the major interest in formulating such a test derives from mergers in the digital sector, there appears to be no reason why other high value, IP-driven sectors such as pharma or agrochemicals should be excluded from the operation of such a complementary jurisdictional test. The drawing of the value threshold net so widely across all sectors means, however, that the drawing of any demarcation point will be seen to achieve arbitrary outcomes in terms of the deals that are captured, while at the same time forsaking a significant degree of legal certainty. Accordingly, it would appear that policymakers are likely to be drawn towards the adoption of a transaction value test which will apply in principle to *all* industrial sectors, while at the same time seeking to set that level so that it catches *only* those transactions which have the potential to be problematic in certain key industrial sectors. In these circumstances, the prescription of one relevant transaction value to catch all mergers may be both elusive and might constitute a classic case of 'over-kill'.

Arguably the greatest drawback of adopting a transaction value test lies in the fact that the perceived 'value' of a transaction is spread unevenly around the world, depending *inter alia* on the origins of the merging parties, their catchment areas in terms of existing sales, the range of their IP protection, and brand awareness in particular cultures and demographics.

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[36] ibid.

[37] In a similar vein, joint control over a company's affairs is often inferred from the ability of a shareholder to be able to veto certain types of investment decisions above a specified amount. Whether or not that specified amount is a trigger for the exercise of joint control depends on the scale of investments anticipated in the particular industry in which the company operates. See EU Consolidated Jurisdiction Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1, paras 65-67.

One jurisdiction's perception of a high value may not accord at all with the comparable perception taking place in another jurisdiction. Accordingly, conducting a merger review because of the 'value' of that merger is likely to require heroic assumptions being made about the true value of that transaction in those jurisdictions where it will be the subject of a merger review. Even within the EU, when one considers the different respective sizes of the economies of the 27 EU Member States, one can imagine that there might be very different perceptions as to where the valuation standard should be set.[38] Given that the world is already awash with over 146 jurisdictions with merger regimes,[39] many of which draw tenuous links between the proposed deal and the physical territory of many of those jurisdictions, the introduction of a transaction value threshold might only add to existing levels of legal uncertainty because of yet another filing criterion whose nexus with the merger review process is speculative. At an even more fundamental level, one needs to ask about the moment in time when "value" is to be measured and the accuracy of that measurement, especially given the extravagant shifts in value experienced on the world's stock exchanges.

Accordingly, as of 2020, there are many reasons why we would not endorse the overall recommendation of the *Cremer Report*[40] *to the effect that the turnover thresholds in the existing EU Merger Regulation* should not be complemented by a transaction value test, at least until meaningful knowledge has been built up over the years about the practical effect of the comparable amendments that are already in force in Germany and Austria.

V. Mandatory Notifications

An alternative reform proposal that has found favour in a number of international reports is based on the unique range of competition concerns surrounding digital platforms. Accordingly, it has been proposed that large

38 For example, it would usually be arbitrary to apportion a part of the value of a transaction based on prospective revenue expected to be generated from any given jurisdiction, the relative GDP of that jurisdiction or any other *pro rata* measurement of a given jurisdiction's relative importance compared to the remaining value attributable to the target on a global basis.

39 International Chamber of Commerce, 'ICC Recommendations on Pre-Merger Notification Regimes' (March 2015) <https://iccwbo.org/publication/icc-recommendations-pre-merger-notification-regimes/#:~:text=More%20than%20146%20jurisdictions%20around,regime%20under%20their%20antitrust%20laws> accessed.

40 Crémer, de Montjoye and Schweitzer (n 1) 115. In her recent speech given in September 2020, Commissioner Vestager has in a similar vein concluded that amendment of the EU Merger Regulation in order to add a transaction value threshold arguably does not constitute the most proportionate solution <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed.

market actors in the digital space be uniquely burdened with *sui generis* merger filing obligations when they are considered to hold positions of market power.[41] The clear public policy challenge, however, is which unique screening mechanism could possibly apply to digital sector mergers without forsaking the requisite degree of legal certainty usually associated with filing obligations.

One of the clearest preferences for the adoption of a *sui generis* filing approach has been voiced by Australian Competition and Consumer Commission ("ACCC"), which has expressed the view that very large (pre-designated) digital platforms should provide advance notice of all their potential acquisitions. Thus, one of the key recommendations of the ACCC Report is that:

> "*Large digital platforms to agree to a notification protocol, to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. The details of the notification protocol will be agreed between the ACCC and each large digital platform, and would specify: the types of acquisitions requiring notification (including any applicable minimum transaction value), and the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition. If such a commitment were not forthcoming from the large digital platforms, the ACCC will make further recommendations to the Government that address this issue.*"[42]

The ACCC proposal is, at least to some degree, the by-product of the hybrid competition law/regulatory legal framework in operation in Australia, especially as regards its anticipated harnessing of the goodwill of large digital platforms to formulate a notification protocol for digital market players. To many jurists from other countries, this invitation to formulate a consensual notification standard might be tantamount to asking "*turkeys to vote for Christmas*" or simply might provide little more than a forum for a

[41] Some of these recommendations are made in conjunction with proposals to introduce transactional value thresholds or with proposals for the reversal of the burden of proof. See, for example, the recent French draft law providing for an obligation on "*dominant digital companies*" to inform the French Competition Authority about all acquisitions "*likely to affect the French market*" one month in advance of the transaction; see Proposition de loi n° 302 du Sénat le 5 février 2020 visant à garantir le libre choix du consommateur dans le cyberspace, arts L.430-2-1(I) <http://www.senat.fr/leg/ppl19-302.html> accessed . The draft law was approved by the French Senate on 8 July 2020, and is now due for deliberation before the National Assembly.

[42] Australian Competition and Consumer Commission (n 1) 30.

protracted debate which could produce an unworkable notification obligation in practice.

A variant to the Australian approach can be found in the proposal set forth in the US under the *Stigler Report*.[43] According to *Stigler*, it would be advisable to create a new sectoral agency (a 'Digital Authority') whose responsibilities would include merger review for those digital platforms considered to hold 'bottleneck power', rather than reliance being placed on the usual revenue-based tools used to trigger notification obligations. Thus, the new agency would be able to review "*even the smallest transactions involving digital businesses with bottleneck power because nascent competition against these entities is very valuable for consumers*".[44] The US Digital Authority's merger powers would apply in parallel with those of the Department of Justice ('DoJ') and the Federal Trade Commission ('FTC'), but would apply different legal standards and would use different procedural tools. The *Stigler Report* concludes that this fundamental shift in enforcement policy is much more proportionate if implemented in a merger context rather than in relation to behavioural practices. Accordingly, "*it would not be prudent to alter the nation's antitrust laws to accommodate one difficult and fast-moving sector where false negatives are particularly costly. Therefore, giving additional power over merger review to the sectoral regulator is a good solution*".[45]

The US approach has both its pros and its cons. While the magnitude of the error in terms of 'false negatives' is indeed arguably greater in the context of a merger control setting than in the prosecution of actions under Sections 1 and 2 of the *Sherman Act*, this is arguably because US antitrust rules are subject to onerous burdens of proof which need to withstand judicial scrutiny on the merits (rather than in accordance with administrative law principles), and because the financial implications of antitrust infringements are so severe.[46] This is not a policy trade-off that is so clear-cut in most other jurisdictions around the world, especially given that the separation between antitrust rules and sector-specific regulation in the US is a principle which

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43 Stigler Center for the Study of the Economy and the State (n 1) 104.

44 ibid 33.

45 ibid 111.

46 Aside from the residual evidentiary difficulties confronting all antitrust enforcement agencies, US authorities need to be prepared to argue their cases before a judge (rather than according to variants of public administrative law standards, while being subject at a later point in time to a judicial appeal). Moreover, the US treble damages rule raises the stakes for antitrust litigation significantly in comparison to legal systems based on the Continental legal tradition.

is adhered to strictly.[47] Doctrinally, it is difficult to envisage such a system being implemented in the US, especially given the fact that sector -specific powers would not extend beyond the domain of merger control[48] and the fact that the existing dual merger review system already implemented by both the DoJ and the FTC has its own well acknowledged difficulties in terms of inconsistencies in approach and cost duplication.[49]

Finally, the proposals put forward in the UK's *Furman Report* set forth another variant to the approaches proposed in Australia and the US. Under the *Furman* proposals, those digital companies designated to hold "Strategic Market Status" would be required to notify their transactions to the UK's Competition and Markets Authority ('CMA'), despite the UK merger regime otherwise remaining "voluntary" in nature. According to the logic of the *Furman Report*:

> "*The largest digital companies conduct a high volume of acquisitions. It is voluntary whether they notify the CMA of the merger. Requiring digital companies that hold a strategic market status to make the CMA aware of their intended acquisitions will allow the CMA to determine in a timely manner which cases warrant more detailed scrutiny.*"[50]

Given the existing UK system would remain a system of voluntary merger notification in relation to every other industrial sector, it is arguable that this proposal might be disproportionate and would, if anything, create a degree of legal uncertainty. Perhaps mindful of the inherent risks in adopting such an approach, the CMA has followed up very recently on the findings of the *Furman Report* by noting that it is considering whether there is a policy justification for the introduction of a separate merger regime altogether for digital companies designated of holding Strategic Market Status. According to the CMA, its current thinking is described as "*any special regime [that] would have its own jurisdictional and substantive tests*". This would involve

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47 Refer to *Credit Suisse Securities (USA) LLC v Billing* 2007 SCC OnLine US SC 59 : 168 L Ed 2d 145 : 551 US 264 (2007); *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP* 2004 SCC OnLine US SC 2 : 157 L Ed 2d 823 : 540 US 398 (2004); *Pacific Bell Telephone Co v Linkline Communications, Inc* 2009 SCC OnLine US SC 21 : 172 L Ed 2d 836 : 555 US 438 (2009).

48 As, for example, the Office of Communications in the UK or the Hellenic Telecommunications and Post Commission in Greece, in relation to telecommunications sector matters.

49 For example, Stigler Center for the Study of the Economy and the State (n 1) 112 notes that the merger review process in the digital market needs to progress rapidly, and that the Digital Authority, as opposed to the DoJ and the FTC, will need a simple and efficient merger review process so that businesses can move forward without undue delay (and the agency does not need to expend more resources than is necessary).

50 Furman and others (n 1) 12.

all firms designated with such a status in the digital sector being required to notify all of their transactions to the CMA, subject to certain limited exceptions. While the substantive test of review would continue to be that of the "substantial lessening of competition" test, the rationale for the CMA's proposal is that "*the increased risks of consumer harm may justify the use of a more cautious standard of proof. The regime could also accommodate a separate assessment of non-competition concerns such as data protection*".[51]

In order to justify such exceptional treatment, all of the proposals for reform discussed above which rely on a mandatory filing requirement pre-suppose the existence of a list of designated firms that possess certain pre-defined qualities. Given the long-standing precedent under EU law which upholds that no individual finding of dominance shall be binding for future investigations,[52] it is difficult to endorse a mandatory filing obligation based on the identity of specific firms, at the very least unless those listed firms have the ability to challenge periodically (*e.g.*, every three to five years) their designation as a firm with either "Bottleneck Power", "Strategic Market Status" or that of a "Large Digital Platform". While the OECD is no doubt justified in concluding that such obligations would be aligned to the notion under EU law that dominant firms are subject to "special obligations",[53] it would also be wise to bear in mind that the doctrine of "special responsibility" under EU competition rules applies to the substantive assessment of the legality of dominant firm *behaviour* in the marketplace,[54] rather than as a jurisdictional threshold which justifies review of the mere *existence* of dominance in the digital sector to the exclusion of all other industrial sectors.

VI. EU Referral System

Within the EU, the proponents of a transaction value test as the appropriate trigger for merger review assume that digital sector transactions falling outside the scope of the *EU Merger Regulation* will otherwise only be capable of being reviewed by individual Member State merger review agencies (if at all), especially given the fact that many digital platforms and ecosystems have a

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51 Refer to Competition & Markets Authority, 'Call for Information: Digital Markets Taskforce' (1 July 2020) 20 <https://assets.publishing.service.gov.uk/media/5efc5e433a6f4023c77a135c/Call_for_information_July2020.pdf> accessed.

52 See Joined Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises Inc v Commissionof the European Communities* [2000] ECR II-01733.

53 OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6)41.

54 Refer to Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) EUI Working Paper RSCAS 2020/14 <https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y> accessed.

truly international dimension. However, this position reflects an over-simplification of the mechanics of the *EU Merger Regulation* and the types of transactions that can be reviewed by the Commission under that Regulation.

A unique aspect of the EU legal framework for the review of mergers is the one-stop-shop rule, which involves the exclusive exercise of power by the Commission in the assessment of large mergers that are deemed to have a "Community dimension" because of the turnover generated by the respective parties to the merger.[55] This means that an individual Member State's merger review agency is not permitted to review a merger with such a Community dimension unless it affects distinct sub-national markets which those National Authorities are uniquely placed to assess.[56] However, a very important exception to this "one-stop-shop" principle of merger review lies in the fact that, if the two alternative threshold EU revenue tests are not satisfied, a merger which qualifies for notification in at least three Member States can be 'referred up' to the Commission for review, at least to the extent that none of the Member States affected object to such a referral.[57]

As a result of the 'referral up' system, for example, a number of high profile digital markets cases that would have otherwise escaped EU level scrutiny have already been assessed by the European Commission, most notably in *Google/Double Click*,[58] *Facebook/WhatsApp*[59] *and Apple/Shazam.*[60] Given the existence of market share notification tests in Spain and Portugal,[61] the 'share of supply' test in the UK (as it applies prior to the UK leaving the EU),[62] and more recently the transaction value tests introduced in Germany and

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[55] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (EU Merger Regulation), art 1(2) establishing the turnover test and art 21(3) establishing the principle of exclusive jurisdiction.

[56] See EU Merger Regulation, arts 4(4) and 9(3).

[57] See EU Merger Regulation, art 4(5). The request for such a referral is made to the Commission by the notifying parties, rather than being initiated by the Commission itself.

[58] Referral upon a request by the notifying parties under EU Merger Regulation, art 4(5); *Google/Doubleclick* (Case COMP/M.4731) [2008]OJ C184/10.

[59] Referral upon a request by the notifying parties under EU Merger Regulation, art 4(5); *Facebook/WhatsApp* (Case COMP/M.7217) [2014].

[60] Referral by the Austrian Competition Authority; referral request joined by the National Competition Authorities of France, Iceland, Italy, Norway, Spain and Sweden; *Apple/Shazam* (Case M.8788) [2018] OJ C417/4. To this end, Commissioner Vestager has indicated in her recent speech that the Commission is planning to put a new policy into effect in 2021, with the aim of further encouraging National Competition Authorities to refer more mergers to the Commission in accordance with its modified enforcement priorities <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed.

[61] The market share threshold is 30% in Spain (see Spanish Competition Act 2007) and 50% in Portugal (see the Portuguese Competition Act 2012, art 37(1)).

[62] Refer to the UK Enterprise Act 2002, s 23.

Austria (or even the usual relatively low turnover-based notification thresholds that would otherwise apply in those jurisdictions),[63] there are a number of EU Member States which provide a strong basis for the application of a 'referral up' procedure to the Commission in many digital sector mergers. The vast bulk of transactions that cannot satisfy such notification criteria must surely be relatively minor in terms of their market impact. Having said that, there are also a number of other high profile digital services mergers which have not triggered three Member State filing obligations, thereby either avoiding review altogether at national level or being subject only to a handful of national merger reviews (*e.g.*, the *Facebook/Instagram* and *Google/Waze* mergers, both of which were reviewed in the UK).[64]

The scheduled departure of the UK from the EU by the end of 2020 as a result of 'Brexit'[65] arguably provides the EU with a unique opportunity to lower the key turnover thresholds for mergers with a Community dimension[66] and, in the process, allows the European Commission to review a greater number of mergers that might be subject to the 'referral up' procedure. Given that the opportunity to re-calibrate EU merger filing thresholds may soon be available to EU competition policy makers, a major by-product of that process may be that an even larger number of digital sector mergers may become subject to the "referral up" procedure.[67]

At first glance, a growth in national transaction value tests and market share tests will inevitably raise the average level of cases that might become subject to merger review by numerous Member States. One could also imagine, however, that the widespread adoption of a 'share of supply' test at Member State level, rather than a more broadly based market share test, would inevitably catch many more digital mergers that might be capable of raising competition law issues despite falling short of revenue-based filing

63 For Austria, refer to the Austrian Competition Act 2017, s 9(4)

64 See UK Office of Fair Trading Case ME/5525/12 *Facebook/Instagram* [2012] and UK Office of Fair Trading Case ME/6167/13 *Google/Waze* [2013], as notable examples which escaped the Commission's scrutiny but which were reviewed under UK merger control rules by the Office of Fair Trading pursuant to the 'share of supply test'.

65 For all relevant updates regarding the Brexit process, refer to the website of the Department for Exiting the European Union <https://www.gov.uk/government/organisations/department-for-exiting-the-european-union> accessed. For an overview of the process on competition law, see European Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU Competition Law' (25 March 2019) <https://ec.europa.eu/info/sites/info/files/eu-competition-law_en.pdf> accessed.

66 This is inevitable, given the fact that the UK has historically been a major jurisdiction for the allocation of the EU turnover.

67 See Vestager, 'Keeping the EU Competitive in a Green and Digital World' (March 2020) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en> accessed.

tests. Focusing on the existence of market power in relation to narrow product ranges that make up a 'share of supply' of a particular product or service, rather than conducting a much more complex antitrust 'markets' analysis, would arguably not only be a more straightforward exercise for jurisdictional purposes[68] but would also be likely to result in more national merger thresholds being satisfied. This would, in turn, exponentially increase the number of national jurisdictions affected by the proposed merger. Insofar as a proposed digital merger does not satisfy such lower jurisdictional thresholds, it is arguable that it would more likely than not be of such minor importance that it would be of relatively minor importance which would arguably not justify competition concerns being addressed at the Community level.

VII. Residual Powers of Review

Another alternative proposal that has been put forward by policymakers to address the anti-competitive implications arising from digital mergers that fall below the *EU Merger Regulation* revenue thresholds is to allow competition agencies to intervene *ex post* against those merged entities in order to address competition problems arising from the merger. Most notably, France has launched a series of proposals for reform which contemplate the use of an additional *ex post* power of review for those transactions which satisfy a minimum level of turnover, where the merger is likely to result in competition concerns and where it does not fall within the jurisdiction of the Commission.[69] Flexible powers of *ex post* intervention already exist under various prescriptions in EEA national jurisdictions as diverse as Sweden, Norway, Hungary, Ireland, Estonia, and Lithuania.[70]

Outside the EU, the Japanese Fair Trade Commission (the "JFTC") has residual authority to conduct necessary investigations into transactions that might not satisfy the mandatory notification tests and is able to issue cease and desist orders where the merger raises competition terms. For example, the 2019 deal involving M3/Nihan Ultmarc, which sought to integrate the

[68] The markets definition exercise is notoriously difficult in substantive merger review proceedings, yet alone at the jurisdictional level where the decision as to whether or not a filing is necessary is a threshold issue. Accordingly, by relying on a 'share of supply' test, one could rely on the objective characteristics of the acquired products or services in question, rather than conducting a complex substitutability analysis involving the application of the Hypothetical Monopolist (SNNIP) test.

[69] Refer to Autorité de la Concurrence's contribution to the debate on competition policy and digital challenges in OECD, 'Start-ups, Killer Acquisitions and Merger Control – Note by France (9 June 2020) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)16&docLanguage=En> accessed.

[70] ibid 7.

various medical data and web services that were in the hands of the respective merging platforms, came to be reviewed by the JFTC when it came to the Authority's attention that the merger might be capable of substantially restricting competition in the market.[71]

Of course, the danger in using such residual powers of review is that they not only act as a major departure from the legal certainty of merger control practice, but also create a category of *ex post* intervention which is radically different from the legal basis and philosophy underpinning Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Of course, there is existing precedent to the effect that, in extreme situations, Article 102 TFEU (and, presumably, its national equivalents) can be used to address abuses of dominance where the theory of harm could not be adequately addressed under the auspices of the merger review process.[72] Having said that, the most recent trend of EU merger decision-making suggests that the Commission will be reluctant to accept that a potential use of Article 102 provides an effective basis upon which to grant clearance to a problematic merger. Moreover, the use of Article 102 legal redress is clearly predicated upon the *abuse* of a dominant market position, rather than on the mere *existence* of dominance that might lead to abusive behaviour.[73]

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[71] Refer to OECD, 'Start-ups, Killer Acquisitions and Merger Control – Note by Japan' (2 June 2020) 6 <https://one.oecd.org/document/DAF/COMP/WD(2020)18/en/pdf> accessed.

[72] See Case T-51/89 *Tetra Pak Rausing SA v Commission of the European Communities* [1990] ECR II-41, paras 1-8, where the Court of First Instance stated that "*the acquisition by an undertaking in a dominant position of an exclusive patent license for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertaking's already very considerable dominance of a market where very little competition is found and or preventing, or at least considerably delaying, the entry of a new competitor in that market, since it has the practical effect of precluding all competition in the relevant market*". In this particular case, however, the circumstances were relatively unique insofar as the competition concern stemmed from the uniqueness of the technology which rested in the hands of only one party in the market. Thus, the acquisition in effect changed monopolists, but the transaction did not arguably change the commercial incentives of the monopoly IP holder, which remained the same post and re-acquisition. Thus, Article 102 was in this situation deemed to be an appropriate *ex post* tool with which to deal with a change in commercial incentives that might result in anti-competitive conduct that was not associated with the acquisition, and also because the most complex threshold issue – the proof of the existence of a dominant position – was uncontroversial. Policy makers will rarely be confronted with such a clear legal alternative, especially given that many digital platforms might not be clearly dominant in a discernible relevant product market.

[73] It is not unlawful for a firm to have a dominant position, but what is prohibited is the abuse of that dominant position. See Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, para 24, where in the Court of Justice stated that, "(…) *Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market*". By contrast, the powers vested in the European Commission under art 106 TFEU allow it to take action against State monopolies or those undertakings granted 'special or exclusive rights' that would render them susceptible to exploiting

Possible changes in EU competition policy which are foreshadowed by the end of 2020 may in fact render any recourse to an *ex post* review mechanism unnecessary. In a recently held stakeholder consultation process, the Commission has considered the possibility of a New Competition Tool being created for policy enforcement purposes which would be directed primarily at addressing the sorts of market failures usually associated with digital service markets characterised by the existence of "digital gatekeepers".[74] The enforcement experience of the Commission in both antitrust and merger cases has left open questions regarding the fitness of existing competition rules to identify and address certain structural competition problems. The most pressing competition problems that have been widely perceived to occur in digital or digitally-enabled markets are seen to be capable of being addressed by new Competition Tools that would complement the Commission's other June 2020 initiative relating to platform-specific *ex ante* regulation.[75]

The first of the New Competition Tool options would seek to address competition concerns arising from unilateral conduct by dominant firms in digitally-enabled markets, without the need to adopt an infringement decision pursuant to Article 102 TFEU. The goal of this tool would be to allow the Commission, working in close cooperation with the National Competition Authorities, to identify competition problems and to intervene before a dominant firm can foreclose its competitors directly or by raising their costs of doing business over time. The second limb of the tool would focus on structural competition problems, where certain characteristics of digital markets such as network and scale effects, the lack of multi-homing and the existence of lock-in effects, the accumulation and lock-in of access to data, and the increased potential for tacit collusion due to algorithm-based technological solutions, create threats to the competitive process. This would enable the Commission to impose behavioural and, where appropriate, structural remedies. However, under such a regime, the Commission would not make any finding that an infringement of EU competition rules has occurred, nor

those rights by virtue of their uniquely held position in the marketplace. See, for example, Case C-553/12 P *European Commission v Dimosia Epicheirisi Ilektrismou AE (DEI),* HellenicRepublic*, Energeiaki Thessalonikis AE, Elliniki Energeia kai Anaptyxi AE* [2014] OJ C315/6.

74 For details of the consultation and the proposed New Competition Tools, refer to 'Single Market – New Complementary Tool to Strengthen Competition Enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed . Feedback period for interested parties closed on 8 September 2020 and the Commission is predicted to confirm its adoption by the end of 2020.

75 Refer to 'Digital Services Act Package - Ex Ante Regulatory Instrument of Very Large Online Platforms Acting as Gatekeepers' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed .

would it need to impose fines capable of generating legal rights for private parties to launch damages claims. While the precise legislative design of these variants of the New Competition Tool and the Commission's potential new powers in relation to the exercise of such powers remain as yet unspecified, the Commission opened its public consultation regarding the proposed measures in early June 2020.[76] In line with the general objective of ensuring fair and undistorted competition in the internal market, the legal basis of such a new tool would be Article 103 TFEU, applied in combination with Article 114 TFEU.

In focusing on structural risks to competition, the Commission's motivation behind this initiative is to allow it to be in a position to address the pan-European business models of many market players, along with the cross-border nature of digital or digitally-enabled products and services in light of increasing consolidation, which arguably cannot be addressed adequately by interventions at a national level. It has to be asked, therefore, whether fundamental changes need to be made to the jurisdictional thresholds set forth in the *EU Merger Regulation* if indeed some of these proposals for reform being considered under the New Competition Tool regime are to be implemented in the foreseeable future. By having recourse to a new range of *ex post* powers (and possibly also complementary ex ante powers under the proposed new *Digital Services Act* proposal) which are not predicated upon the finding of dominance or an act of strategic abusive behaviour, it becomes clear that a number of errors of assessment that might have occurred in theory in the process of merger review could in principle be corrected at a later point in time if in fact digital markets have been foreclosed to competitors or where those markets have 'tipped' in favour of the leading firm because of structural features of the market. This is especially the case where those market implications are not clear at the time of the review of the merger.

Finally, thought might be given to whether the residual power of review at EU level need only reflect the situation that existed under the case-law prior to the enactment of the *EU Merger Regulation*. Under existing case-law, Articles 101 and 102 TFEU were seen to apply at the time respectively to minority shareholdings in competitors which could result in potential collusive effects[77] or where the merger might lead to the creation of a position

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76 'Single Market – New Complementary Tool to Strengthen Competition Enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed .

77 Joined Cases 142 and 156/84 *British American Tobacco Co Ltd v Commission of the European Communities* [1987] ECR 04487.

of market dominance.[78] This possibility of this type of intervention has also recently been explored in the US by the FTC in relation to potential enforcement action that might be available under Section 2 of the *Sherman Act*.[79]

The use of behavioural tools such as Articles 101 and 102 TFEU is not without merit, especially as regards the use of Article 101 in the context of claims of tacit collusion in the wake of minority stakes in competitors. This makes a lot of sense from a policy perspective, given that it is only the acquisition of 'control' (i.e., something of much greater significance than a minority stake) that can trigger a merger filing obligation. The perspective under Article 102 is somewhat different, however, given that the genesis of the *EU Merger Regulation* was to address mergers that led to the creation or reinforcement of a position of market dominance through the fusion of previously independent firms. If that exclusive jurisdiction is undermined by the exercise of a parallel legal instrument that can address anew the impact of market power flowing from the same merger which has already been reviewed the merger in question, it may undermine much of the legal certainty generated by the adoption of the Regulation. Conversely, while the use of Article 102 route may not be without merit if the merger has not been subject to any form of effective merger review scrutiny in the past, that is an unlikely scenario for any deal with a major impact on an economy, given the range of national merger control rules now in place. Moreover, insofar as the EU endorses the use of a new Competition Tool (see above), the need for an overarching use of Article 102 TFEU in such cases seems both duplicative and excessively onerous on industry.

VIII. Substantive Standards of Review

Having determined that a new merger review threshold might be introduced to catch digital sector mergers that might otherwise escape from existing jurisdictional tests , the question has been asked whether the existing legal standards of merger review continue to be appropriate or adequate in addressing the types of competition law concerns that may arise from such mergers. The prevailing legal standard of review in most jurisdictions around the world is whether the transaction is capable of resulting in a Substantial Impediment

[78] Refer to Case 6-72 *Europemballage Corpn and Continental Can Co Inc v Commission of the European Communities* [1973] ECR 00215.

[79] Refer to Federal Trade Commission, 'Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms' (24 September 2019) <https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf> accessed.

of Effective Competition (the so-called 'SIEC' test).[80] According to the application of that legal standard of review in the EU, the compatibility of a notified merger with the common market is assessed by reference to a much wider point of reference than one of whether the merger creates or strengthens a dominant position. As such, it enables the European Commission to focus on wider market equilibrium effects of the proposed merger. In doing so, the SIEC standard ensures that the non-coordinated effects of mergers in oligopolistic markets can be reviewed, especially those that lie in the 'gap' between single firm dominance and collective dominance.[81] Increasingly, the SIEC test is being used in relation to vertical mergers where the post-merger changes affect the bargaining power of competitors and customers, rather than the scale of the market share change post-merger.[82]

However, the application of the SIEC test also gets very close to endorsing a 'balance of probabilities' approach. In the eyes of the OECD, this has the tendency to introduce a systemic bias *against* the challenge of mergers that are expected to result in anti-competitive effects. This is particularly relevant to the acquisition of nascent digital market actors, because the probability of harm from such "killer" acquisitions is less likely to be clearly established.[83]

When assessing whether the SIEC standard is an effective basis upon which merger review agencies can conduct their merger analysis in more complex digital markets, the prevailing questions focus primarily on the following issues:

- whether the application of the SIEC test is sufficiently robust to be capable of addressing the sorts of issues raised in digital mergers or whether it is best replaced by a standard of review based on a "**balance of harms**";
- whether key aspects of the **burden of proof** should be modified or reversed and/or whether certain **rebuttable presumptions of harm** should be introduced in order to facilitate the decision-making process; and

80 EU Merger Regulation, art 2(3). The more traditional standard has historically been that of whether a transaction created or reinforced a position of market dominance.

81 Refer to Recital 25 of the EU Merger Regulation. Refer also to Lars-Hendrik Roller and Miguel de la Mano, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) European Competition Journal 9.

82 For example, see recent *Telia Company/Bonnier Broadcasting Holding* (Case M.9064) [2019] OJ C160/6.

83 Refer to OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 37-38.

- whether certain more novel **theories of harm** need to be further explored in order to generate a climate of effective review in relation to digital sector mergers.

In analysing these issues, there is growing consensus in the eyes of policymakers around the world on one especially important public policy background issue; namely, in relation to digital sector mergers it is preferable to make an error in being over-zealous in the prohibition of mergers than in being overly-cautious by not censuring them.[84]

IX. Balance of Harms Test

Most strident in its views that the SIEC test is no longer "fit for purpose" is the UK's *Furman Report*, which advocates strongly that its competition agency, the CMA, should replace the usual analysis based on the SIEC test and should be allowed to rely on a "balance of harms" test.[85] According to *Furman*, the application of a "balance of harms" test would involve:"*Legislation to allow the CMA to use a 'balance of harms' approach which takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation*".[86]

Such a test would differ from the application of the SIEC test insofar as it would take into account *the scale of the harm and the benefits* to be accounted for alongside their likelihood of occurring. Currently, merger assessments only consider how likely a merger is to reduce competition. In the case of nascent acquisitions, this can constitute a crucial gap in enforcement capabilities. If the fledgling company would have otherwise become a serious and innovative competitor to its acquirer, the scale of the resulting competition would in principle generate far greater consumer benefits than the efficiency benefits derived from the merger itself. The alleged shortcomings of the SIEC approach were considered in the findings of a study

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84 According to the Stigler Center for the Study of the Economy and the State (n 1), the risks raised by under enforcement are far greater in the digital markets context because the risk of enduring market power in the hands of digital platforms is enduring (refer to p 94). Refer also to OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 33; Argentesi and others, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (n 1) 65; Charley Connor, 'Focus on Merger Control to Combat Big Tech, Enforcers Urge' (Global Competition Review, 3 March 2020) <https://globalcompetitionreview.com/article/1215869/focus-on-merger-control-to-combat-big-tech-enforcers-urge> accessed.

85 Refer to Furman and others (n 1) 13. Refer also to the Italian position which, while proposing that the standard of evaluation be changed, provides no specific recommendations in this regard <https://antitrustdigest.net/italys-big-data-report/> accessed.

86 ibid.

conducted by the Lear Group for the CMA in 2019,[87] which conducted an *ex post* review of digital mergers. According to that study, market evidence could be identified which supported the view that certain fledgling digital actors had witnessed very significant and rapid growth in their operations post-merger.[88] In stark contrast, even when identifying the theories of harm that might attach to the transactions in which those parties were involved, the competition agencies were unable to adduce compelling evidence as to the certainty of that commercial growth when applying the SIEC test.[89]

Accordingly, concludes the *Furman Report*, merger enforcement in the digital sector would be enhanced by the adoption of a balance of harms approach, which would allow a merger agency to establish a counterfactual scenario[90] against other potential counterfactual scenarios in determining the likelihood of potential harm that might be generated by the digital merger under review.[91] Indeed, there is some evidence that the CMA has already endorsed aspects of the balance of harms approach in its recent administrative practice.[92]

The OECD has expressed its qualified support for the view that an approach based on the balance of harms might be more advantageous in vetting digital sector mergers, while at the same time recognising the difficulties inherent in adopting such an approach.[93] Thus, while an approach based on the balance of probabilities would clearly be a more desirable legal standard from the viewpoint of industry, and from the perspective of achieving legal certainty more generally, greater clarity in the application of a "balance of harms test" could arguably be achieved if merger agencies were able to set out transparently the probabilities attached by them to *each recognisable set of counterfactuals* that have arisen in their assessment of the facts.[94] In the view of the OECD, the benefits of such an approach rest in the ability of

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87 ibid.

88 ibid 118; analysing, *inter alia*, the mergers of *Facebook/Instagram* and *Google/Waze*. The companies also witnessed constant and significant growth in the years leading up to the merger, had promising business models, and plans for an expansion that might have increased their relevance in the markets where their acquirers were active.

89 ibid; emphasising that the CMA dismissed such evidence mostly due to the uncertainty surrounding whether Instagram's and Waze's potential growth would have been realised. Similarly, the authority rejected such evidence in its recent clearance in ME/6886/20 *Visa/Plaid* [2020].

90 A counterfactual scenario is one in which the market situation absent the merger is compared to the market situation that is likely to be generated by the merger.

91 Furman and others (n 1) 99-100.

92 See, for example, CMA ME/6743/18 *Experian/ClearScore* [2019]; CMA ME/6760/18 *Top Cashback/Quidco* [2019].

93 OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 37-38.

94 ibid 38.

a merger agency to be able to select a counterfactual scenario on the basis of the best evidence available, while acknowledging that there might be multiple possible counterfactual events that could flow from the facts under examination.

By doing so, a merger agency would be less prone to default to an overly cautious position and inaction where the evidence is ambiguous. This could help to avoid the ongoing challenges posed by the perceived level of under-enforcement that is alleged to be occurring in the digital sector. However, the OECD warns that, in those situations where the evidence upon which to form an expectation of the counterfactual is relatively thin, it may be difficult in practice to choose between which counterfactual situation should prevail. As a practical matter, this will render the agency's decision vulnerable to challenge before a court of appeal.[95] Having said that, the OECD's overall position is that merger agencies should not shy away from such decisions as they will be important in delineating the outer limits of those mergers which are permissible when compared to those which should be prohibited.[96] For its part, the *Cremer Report* takes the view that, despite its evidentiary shortcomings in complex and shifting digital markets, the SIEC test remains a sound basis upon which to continue merger enforcement in the digital sector. While acknowledging that a gap does exist in implementing accepted theories of harm in the context of digital sector mergers, the *Cremer Report* nevertheless takes the view that:

> *"[C]ompetition law should try to translate general insights about error costs into legal tests. The specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such as that some modifications of the established tests, including allocation of the definition of the standard of proof."*[97]

The *Cremer Report* concludes by supporting the traditional legal standards used by agencies to review horizontal mergers, while at the same time placing greater emphasis on potential constraints within the technological 'space' or 'ecosystem' of the acquirer. After having determined whether or not competitive harm is likely to follow in the relevant space or ecosystem from the planned acquisition, one can then turn to whether the merging parties can discharge the burden of proof in proving that the proposed merger

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[95] An appeal judge is unlikely to be impressed, for example, if the counterfactual scenarios being considered by the merger agency cross the spectrum of "no impact on competition" to "severe foreclosure of competitors".

[96] OECD,'Start-ups, Killer Acquisitions and Merger Control' (n 6) 38.

[97] Crémer, de Montjoye and Schweitzer (n 1) 4.

generates efficiencies which outweigh its harmful effects on competition.[98] The approach set forth in *Cremer* seems to emphasise the importance of *potential competition*, but provides few clues as to how compelling the evidence about restrictions to potential competition needs to be.

By contrast, the pre-eminence to be granted to the loss of potential competition has been amplified by the ACCC in such a way as to elevate this level of analysis to a statutory requirement. Thus, the ACCC has proposed:

> "*amending section 50(3) of the Competition and Consumer Act 2010 to specifically include in the assessment whether a merger has the effect of or likely effect of substantially lessening competition: (a) the likelihood that an acquisition would result in the removal from the market of a potential competitor, and (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.*"[99]

This policy is elaborated upon by the ACCC when explaining in its Report that a systematic policy of acquisitions in light of the recognisable market potential of target firms will be a very material consideration in its deliberations as to whether or not the a theory of harm can be pursued based on whether potential competition is being impeded.[100] Germany has pursued a very similar line of reasoning by focusing on whether the acquirer is putting into effect an overall strategy to acquire on a systematic basis fast-growing companies with a recognisable and considerable potential to become competitors of the acquirer in the future.[101]

Although one can see the obvious merits of adopting a "balance of harms" approach from a merger agency's point of view, it is not without its problems. Unless grounded in strong legal foundations, such a standard of review could find itself significantly compromised because of the expectations imposed by a court of appeal. Within the EU, given the General Court's very recent censure of the European Commission's approach in the *H3/O2*[102] *in applying the SIEC standard to a mobile sector 'gap' case, one would not be stretching the imagination to conclude that the European Courts*

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98 ibid116.

99 Australian Competition and Consumer Commission (n 1) 105, Recommendation No 1.

100 ibid 106.

101 The German Competition Authority will systematically analyse the digital companies' operations; refer to Sauermann, 'New Merger Control Guidelines for Transaction Value Thresholds in Austria and Germany' (*Competition Policy International*, 26 July 2018) <https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/> accessed.

102 Refer to the recent judgment in Case T-399/16 *CK Telecoms UK Investments v Commission* (GC, 28 May 2020).

would not be inclined to allow the Commission unlimited discretion in its choice of counterfactual scenarios. Judges sitting on appeal are unlikely to see much merit in this level of discretion, at least in the absence of very clear legislative foundations to support such a radical shift in administrative decision-making. Moreover, such a policy shift, in light of plans in the EU to introduce a corrective mechanism in the form of a New Competition Tool (see Section III above) may be disproportionate, especially given that the types of concerns supporting such a fundamental procedural change are limited to one sector of the economy.

In this context, it must also be asked whether the adoption of a balance of harms test that goes beyond the scope of digital sector mergers is necessary, given that its application is likely to add further complexity and delay to merger reviews in other sectors of the economy. Given the narrow range of counterfactuals that would be available in more traditional sectors of the economy, the range of options that would need to be considered under a balance of harms approach would prima facie appear to create disproportionate costs from the viewpoints of both agencies and notifying parties. Accordingly, the introduction of such a test might indeed require that it be adopted only where markets (including digital markets) have certain objectively identifiable characteristics which lend themselves to an analysis driven by the balance of harms approach. Even where the application of such a standard might be expressly limited to digital markets, there will be those that are concerned that this standard will permeate into broader merger review standards over time through administrative practice.

X. Shifting Burden of Proof

The shifting of the legal standard from the SIEC test to a more flexible legal standard which favours a merger agency's freedom of action is often aligned in the various international reports to proposed shifts in the standard of proof that is used to establish certain key propositions, often by establishing presumptions about the state of competition which need to be rebutted by the merging parties. This provides an alternative basis by which one can assess problematic mergers.

Currently, there is no presumption of legality or illegality about mergers that is found in the merger review regimes around the globe, including that of the EU. However, it is increasingly felt in some circles that the prevailing legal standards of review result in a situation where it is the merging firms, and not consumers, who enjoy the benefit of the doubt when transactions

are being assessed.[103] Put another way, there is a growing feeling that, while there is a need for an effects-based analysis of mergers, that analysis has often taken place in the past against a conservative premise that mergers that cannot be *confidently* identified as being harmful to consumers should be permitted.[104]

The question therefore arises whether, in the specific circumstances presented by acquisitions of nascent digital firms, the burden of proof should be reversed. In this context, some of the international reports have suggested that instead of imposing an obligation on competition authorities to demonstrate that the merger will have a negative impact on the market before they block the acquisition (or impose remedies), one would impose an obligation on the acquirer to demonstrate the *pro-competitive aspects of its acquisition*, or the lack of competitive harm.

The OECD has expressed the view that the proposal to reverse the burden of proof and to establish a rebuttable presumption is "*perhaps the most important proposal that has emerged from the debate over the acquisition of nascent firms [generally]*".[105] Specifically, the OECD considers that there is "*considerable merit*" in legislating to reverse the burden of proof in defined circumstances such acquisitions of nascent digital players by dominant firms (by creating of rebuttable presumption of anti-competitiveness) or where the acquisition increases the risk of competitive harm in circumstances where a reasonable proportion of the market (*e.g.*, 25%-30%) has been affected.[106]

In the context of the EU, such a proposal was endorsed in July 2020 by the French Parliament under a new draft law which provides for a merger notification obligation to be imposed on so-called "*dominant digital companies*", pursuant to which they need to prove that the acquisition being investigated by the Authority is not likely to harm competition.[107] Notably, the proposal to reverse the burden of proof has been one of the cornerstones of the

[103] See comments of the Chief Economist of the European Commission, Pierre Régibeau, during Concurrences webinar, Enforcement, Covid and the Aftermath: Some Economic Myth Busting (9 June 2020) <https://www.concurrences.com/en/conferences/webinar-7-enforcement-covid-and-the-aftermath-some-economic-myth-busting-en> accessed.

[104] See, *inter alia*, Marc Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (February 2020) 20 <https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_2020.pdf> accessed.

[105] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (n 6) 34.

[106] ibid 2.

[107] Refer to the Proposition de loi n° 302 du Sénat le 5 février 2020 visant à garantir le libre choix du consommateur dans le cyberspace, arts L.430-3 to L.430-3 <http://www.senat.fr/leg/ppl19-302.html> accessed. The draft law was approved by the French Senate on 8 July 2020, pending deliberation before the National Assembly <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1206450&siteid=190&rdir=1> accessed.

Cremer Report,[108] while also being endorsed by two European Commission former Chief Economists – Professors Valletti and Motta.[109] The *Cremer Report* considers that where an acquisition plausibly forms part of a strategy to remove start-ups by a dominant platform/ecosystem, the notifying parties should bear the burden of demonstrating that the adverse effects on competition are "*offset by merger-specific efficiencies*".[110] The authors of the Report note that such a reform would not create a presumption against the inherent legality of nascent mergers – rather, it would take due account of new business strategies and the competitive risks they raise, and should help to minimise false negatives in a digital setting, the costs of which are particularly high.

A broader consensus on the benefits of the burden of proof being reversed can also be identified outside the EU, particularly in the reports tabled in Australia and the US. The *ACCC Report* notes that:

> "*it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia. […] [A] bsent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition*".[111]

Along similar lines, the *Stigler Report* suggests that:

> "*specific merger regulations should require merging firms to demonstrate that the combination will affirmatively promote competition. This shifting of the burden of proof from the government (to prove harm) to the parties (to prove benefit) will assist the Digital Authority by placing the job of demonstrating efficiencies on the parties, who have a greater ability to know what they are*".[112]

In this regard, the relative importance of the information asymmetries noted by the ACCC has been highlighted by authors such as Bourreau & de Streel, who note that information asymmetries regarding technology and market evolution is probably higher between large high-tech firms and antitrust agencies than in other industries. In such cases, establishing certain

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108 Crémer, de Montjoye and Schweitzer (n 1) 11.

109 Tommaso Valleti, 'Tech Giants in the Digital Age' (5 December 2018) 5 <https://ecp.crai.com/wp-content/uploads/2018/12/Tommaso-Valletti-2018.pdf> accessed; Massimo Motta and Martin Peitz, 'Big Tech Mergers' (May 2020) Discussion Paper No 147, 35 <https://www.crctr224.de/en/research-output/discussion-papers/archive/2020/big-tech-mergers-massimo-motta-martin-peitz> accessed.

110 Crémer, de Montjoye and Schweitzer (n 1) 11.

111 Australian Competition and Consumer Commission (n 1) 199.

112 Stigler Center for the Study of the Economy and the State (n 1) 111.

presumptions about the impact of a merger may compel big tech companies to disclose information to the competitor and agencies alike, thereby reducing those information asymmetries.[113]

In the context of the US specifically, the proposals for a reversal of the burden of proof have been highlighted as capable of producing particularly beneficial results.[114] Currently, a structural presumption of illegality exists in the US to the effect that, in certain circumstances, the burden of proof in concentrated markets will be reversed, with the understanding being that mergers in such markets will be likely to be anti-competitive (and should hence be prohibited).[115] The presumption means that a merger which *"produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially, that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."*[116] This structural presumption would be very difficult to apply to acquisitions of nascent rivals with little existing turnover. The proposals to strengthen this presumption, by relying not merely on increments in market concentration, but rather on factors such as a history of nascent acquisitions, would help to further recalibrate decision-making in the digital environment by removing the existing bias in favour of costly under-enforcement in relation to acquisitions of nascent firms.

These proposed shifts in the burden of proof from merger review agencies to the notifying parties may indeed provide a more coherent basis upon which to change current merger regimes, at least where the potential effects of mergers are more problematic. Such a shift makes particular sense where one takes the view that the downsides of over-intervention are less profound in the merger context when compared to antitrust intervention for abusive behaviour. Then again, as has been argued above, the risks of under-enforcement are nowhere near as great in the EU if the corrective mechanisms

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[113] Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (n 104).

[114] Jonathan Baker and others, 'Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets' (30 April 2020) <https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf> accessed .

[115] *United States v Philadelphia National Bank* 1963 SCC OnLine US SC 155 : 10 L Ed 2d 915 : 374 US 321 1963.

[116] ibid [363].

proposed under the New Competition Tool consultation are implemented into EU law in early 2021.

At the same time, if such fundamental procedural changes are introduced, it should follow that the appraisal of efficiencies must also be elevated as a genuine analytical step in the merger review process, rather than being treated as an afterthought. For far too long, notifying parties have only resorted to an analysis of efficiencies in practice if and when their merger seemed doomed to prohibition or very intrusive remedies.[117] Perhaps the shift in the areas of proof proposed might achieve the aim of supporting a dialogue on efficiencies at the heart of the merger review process, rather than at its periphery. Finally, whichever evidentiary regime is implemented needs to ensure that it does not unwittingly have a chilling effect on investment in new technologies, while allowing small innovative firms to cash in on their inventions, similar to a number of other industries that rely on licensing practices to generate revenue flows for smaller market players.[118] Beyond these considerations, the issue remains as to whether or not merger review agencies, having accepted that efficiencies might indeed flow from the acquisition of a fledging digital player, have the necessary tools available in order to monitor than the efficiencies have materialized in the post-merger environment.[119]

XI. Alternative Theories of Harm

In their proposals for the application of new legal standards of merger review, perhaps the various international studies have been swayed by the fact that the learning curves in the realm of mergers and behavioural infringements in the digital sector have been so steep that a radical overhaul of existing practice is deemed to be necessary. The adoption of a number of key decisions by the European Commission and their imminent resolution on appeal before

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117 Although it is clear that economic efficiencies should be an integral part of the Commission's competitive effects analysis, as is explained in Recital (29) of the EU Merger Regulation, "It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers [...]". Refer also to Chapter 18 in Alistair Lindsay and Alison Berridge, *The EU Merger Regulation: Substantive Issues* (4th edn, Sweet & Maxwell 2012). In the context of nascent acquisitions, Bourreau and de Streel have concluded that the acquisition of start-ups in both the pharma and the digital sectors has the potential to affect innovation in each respective sector, whether positively or negatively. Refer to Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control' (n 104).

118 See Christian Ahlborn, Gerwin Van Gerven and Josh Buckland, *EU Antitrust Chief's Potential Reversal of "Burden of Proof" for Big Tech: Pitfalls and Implications* (*Lexology*, 20 November 2019) <https://www.lexology.com/library/detail.aspx?g=2d7c2789-492f-4c80-8724-0538ced9d96c> accessed.

119 Crémer, de Montjoye and Schweitzer (n 1) 123.

the General Court over the course of 2020-2021 may mean that many of the complex issues that have arisen in the context of Commission investigations will be resolved in the short term.[120] The resolution of a range of market definition and theory of harm questions at the European Court level may mean that, once the jurisdictional issue has been resolved, the substantive assessment of mergers that are considered to be "killer acquisitions" might proceed along more well understood grounds.

Lying at the heart of any analysis of digital sector mergers is the reality that the traditional unilateral effects and coordinated effects theories which apply to the bulk of mergers in other industrial sectors have a relatively minor role to play in digital environments.[121] Instead, the nature of digital platforms and ecosystems means that the bulk of competition issues arising from mergers in the sector raise much more complicated questions of vertical foreclosure and conglomerate effects, exacerbated in the "killer acquisition" context by the elimination of potential competitors. In the case of Australia (as noted earlier), the relative importance of the elimination of potential competition as a primary concern is enshrined in a proposal for legislative change. In addition, the *ACCC Report* was willing to speculate that, when developing theories of harm, merger review agencies should consider attributing special weight to the effects of data and expertise accumulation, economies of scope and the superior bargaining power of those holding data. In the words of the ACCC, there should be a means by which to factor into the substantive assessment "*the nature and significance of assets, including data and technology, being acquired directly through the body corporate*".[122]

A number of these issues have already been explored in existing administrative European precedents. Thus, anti-competitive effects resulting from network effects and a lack of effective multi-homing,[123] in markets for "attention",[124] the loss of potential competition and the loss of innovation,[125] are

[120] Refer to discussion in Alexiadis and de Streel (n 54) 10-15.

[121] Traditionally, there are two ways in which a merger between competitors can lessen competition and harm consumers, namely: (1) by creating or enhancing the ability of the remaining firms to act in a coordinated way on some competitive dimension (coordinated effects); or (2) by permitting the merged firm to raise prices profitably on its own (unilateral effects).

[122] Refer to Australian Competition and Consumer Commission (n 1) 105.

[123] Loss of competition with network effects and multi-homing was effectively explored by the Commission in *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4; *Microsoft/Skype* (Case M.6281) [2011] OJ C341/2; by the UK's Competition and Markets Authority in *Just Eat/Hungryhouse* (ME/6659-16) [2017]; and by the French Autorité de la Concurrence *SeLoger/Logic-Immo* (D No 18-DCC-18)[2018].

[124] Explored by the Commission in *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4 and *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4.

[125] Explored most notably by the Commission in *Dow/DuPont* (Case M.7932) [2017] OJ C353/9 and in *Bayer/Monsanto* (Case M.8084) [2018] OJ C459/10, where the Commission

all issues which have already been addressed by the Commission and various National Competition Authorities under theories of harm configured around variants of traditional unilateral effects theories. Similarly, foreclosure concerns in conglomerate or vertical mergers have already arisen in the context of analyses of network effects and the lack of effective multi-homing,[126] or in relation to "big data" being used as an essential input with which to compete.[127] By the same token, criticism has been raised by the UK's *Lear Report* against what it alleges to have been the overly conservative approach taken by the CMA in its competitive assessment conducted in such cases as *Facebook/Instagram* and *Google/Waze*.[128]

The development of a robust conglomerate effects theory will arguably capture many of the recurring competitive concerns that arise in digital sector mergers. As noted by the OECD in a recent Report, the industrial product conglomerates of the 1960s-1970s have now been replaced in significance by digital firms operating multi-sided platforms.[129] In the view of the OECD, some digital firms are often capable of generating anti-competitive harm through their bundling and tying practices or through the raising of rivals' costs by obliging them to enter into multiple product and service categories simultaneously (in its broadest terms, an 'envelopment' strategy which raises significant barriers to entry). Theories of harm based on such practices are predicated *inter alia* upon findings of the existence of economies of scale and scope, low marginal costs, network effects, positive feedback loops, and privileged access to essential components such as data or software.[130] Unfortunately, whereas the principles underpinning conglomerate effects theory are clear, their application to digital markets based on existing administrative precedents is anything but straightforward. This is because the public policy choices will be very delicately poised between the positive

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developed a theory of harm that the merger would have resulted in reduced incentives to innovate. In doing so, it introduced the language of 'innovation spaces' occurring at the level of *early* R&D efforts, and not solely with respect to well-defined pipeline products. The principle of disrupting innovation is reminiscent of Schumpeter's views about the process of 'creative destruction' creating new business structures.

126 Notably in *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4.

127 See *Facebook/WhatsApp* (Case M.7217) [2019] OJ C417/4; *Microsoft/Linkedin* (Case M.8124) [2016] OJ C388/4; *Google/DoubleClick* (Case M.4731) [2008] OJ C184/10; *Apple/Shazam* (Case M.8788) [2018] OJ C417/4; *Verizon/Yahoo* (Case M.8180) [2016] OJ C434/7; *Microsoft/Yahoo! Search Business* (Case M.5727) [2010].

128 Argentesi and others, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (n 1) 21, where the authors note that the decisions taken in *Facebook/Instagram* and *Google/Waze* may have represented "*missed opportunities for the emergence of challengers to the market incumbents*".

129 OECD, 'Roundtable on Conglomerate Effects of Mergers: Background Note by the Secretariat' (n 19) 5.

130 ibid 24.

effects of multi-product offerings on consumer choice, on the one hand, and the risk of foreclosure of competitors, on the other. As such, each merger review in the digital space will turn on its very particular facts and the identification of clear principles of guidance may be elusive.

In turn, vertical merger theory in the EU is in the process of being re-shaped as a result of the introduction over the past few years of Nash bargaining theory alongside vertical foreclosure principles.[131] This process is still very much a "work in progress", but the introduction of bargaining theory into vertical foreclosure analysis is something which will inevitably be expanded over time.[132] Given the tremendous scale and scope of some digital platforms, it is clear that their bargaining power vis-à-vis upstream and downstream digital players will be relatively unique, and will raise many similar theories of harm associated with conglomerate effects. Accordingly, we can expect vertical foreclosure theory to be explored further over time in the digital space. As is the case with conglomerate effects theory, however, the public policy issues are finely balanced because so much consumer welfare is generated in the digital space by the process of vertical integration (especially the avoidance of double marginalisation and the belief that innovation is more quickly delivered in many situations by a vertically integrated firm).[133]

As conglomerate effects and vertical foreclosure theories are developed in the digital space, there is arguably a public policy safety net potentially available to antitrust policymakers in the form of the New Competition Tool (see Section III above), which potentially affords the Commission more enforcement leeway in its application of such theories of harm.

XII. Conclusions

The various proposals put forward in many of the international reports and studies open up the possibility that not only might merger review agencies be able to review more digital markets mergers in the near future (*i.e.*, in the jurisdictional phase) but that, when engaging in merger reviews, the legal

[131] The exploration of this approach arose most clearly in the 2019 reversal of the US Justice Department's Decision to block the merger in *United States v AT&T, Inc* No 18-5214 (DC Cir 2019).

[132] Refer, for example, to the approach of the European Commission in 2019 in *Telia/Bonnier* (Case M.9064) [2019] OJ C160/04.

[133] Most recently, refer to the discussion in the revised 'Vertical Merger Guidelines' (*US Department of Justice & The Federal Trade Commission*, 30 June 2020) <https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf> accessed.

standard of proof relied upon (*i*.e., in the analytical phase) might be relaxed to take into account their economic complexities. While some might characterise the debate about the need for fundamental review of merger regimes as an exercise in a "*solution searching for a problem*",[134] given the ambiguous evidence around whether or not any meaningful consumer harm has occurred as a result of the current legal regime, others feel that change is both necessary and overdue.

With respect to the **jurisdictional** phase, it will be some time before the practical experiences gained in the application of transaction value tests in Germany and Austria provide valuable insights into the viability of introducing such jurisdictional changes for the review of digital sector mergers. In the meantime, it will be increasingly difficult to justify at which level such transaction values should be set, especially where the new jurisdictional standard is to apply across all industrial sectors and the transaction value will not be apportioned in equal ratios across geographic jurisdictions.

By the same token, a policy of designation in advance of specified digital players that will be obliged to notify their mergers – especially if set at a low threshold level – poses clear risks that its results may be arbitrary. Unless such a regime is very carefully administered to allow for shifts in market structure, it threatens to raise a series of legal questions which could undermine its operation. At the very least, any such designation should be linked to a regulatory regime where the same threshold-setting exercise is relied upon, and where periodic review of the relevant designation standard takes place.

More fertile jurisdictional ground is arguably available to the Commission in its review of more digital sector mergers, with the opportunity existing for more mergers to be 'referred up' to Brussels where a number of Member State filing requirements have been satisfied. The reality of the UK leaving the EU by the end of 2020 will inevitably result in a fundamental re-appraisal of existing jurisdictional merger allocation rules across the EU.

Finally, there is every reason to believe that, even in situations where certain digital sector mergers fall between the proverbial cracks of European Commission merger reviews, the possible adoption of a New Competition Tool regime at some stage in early 2021 (which may be reinforced in its effect by the adoption of specific regulatory obligations on digital platform

134 Refer to K.C. Limarzi and R.S. Phillips, '"Killer Acquisitions," Big Tech, and Section 2: A Solution in Search of a Problem' [2020] Competition Policy International Antitrust Chronicle<https://www.competitionpolicyinternational.com/category/antitrust-chronicle/antitrust-chronicle-2020/spring-2020-volume-2-number-2/> accessed.

providers) will provide the Commission with the possibility of addressing a range of market failures flowing from such mergers after an appropriate volume of market evidence has been collected. In this way, even on a worst-case scenario that the Commission's analysis of a digital merger has been compromised by a lack of evidence or a lack of jurisdiction over the original transaction, many negative market impacts arising from the merger could in principle be addressed at a later stage.

With respect to the **analytical** phase, the situation is even more complex. Those who advocate the relaxation of the SIEC standard have posited that one of two alternative options be adopted. The first of these is the proposal that a "balance of harms" test be relied upon. While conferring much greater freedom of manoeuvre for merger review agencies, this option would inevitably run into difficulties before appeal courts, unless managed very carefully. Moreover, it might be a legal standard which is unnecessary outside the world of digital markets. The ability of merger review agencies to embrace arguments about the efficiency of a merger as part of such an analysis might, however, be its saving grace, although progress along such lines has been patchy in the administrative practice of the Commission. An interesting aspect of the application of such a 'balance of harms' approach, at least in some quarters, is the emphasis placed on the tendency of large digital firms to engage in "serial acquisitions" of smaller market players. The motivation behind such multiple acquisitions would be linked to the likely counterfactual scenario which is most consistent with multiple acquisitions in related, neighbouring or adjacent digital markets. Arguably a more elegant solution, and one which can be more easily used in relation to mergers in other sectors, is to reverse existing burdens of proof or to create rebuttable presumptions which need to be dispelled by the notifying parties. Statements by the Commission's Chief Economist, Pierre Regibeau, tend to endorse the adoption of such a view.[135] Again, however, the treatment of efficiencies lies at the heart of any appraisal of the reasonableness of such a proposal.

Finally, prior to engaging in radical procedural change, further thought should be given as to how existing theories of harm concerning vertical and conglomerate effects on competition can be adapted to digital markets. Much of the thinking that has recently gone into the adaptation of these approaches opens up the possibility that digital mergers might be capable of being addressed without the need for radical procedural change, … at least just yet.

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[135] For example, refer to interview notes from the *Concurrences 1st International Merger Conference*, 19 February 2020, London.

Killer Robots or Soldiers of the Future: Legal Issues and India's Role in the Lethal Autonomous Weapons Debate

*Sarvjeet Singh and Sharngan Aravindakshan**

I. Introduction

In November 2017, a short film was screened at the meeting of the United Nations Convention on Certain Conventional Weapons (CCW) in Geneva. Titled 'Slaughterbots', it showed a contractor advertising his latest product – a small drone with artificial intelligence that has the ability to find, target and kill.[1] The film goes on to show the drones fall into the wrong hands, get unleashed onto the world and proceed to wreak havoc by indiscriminately shooting people in the head.[2]

This dramatic, yet powerful film was screened at the CCW meeting for a significant reason. At the time, the 2018 Group of Governmental Experts

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1 Ben Brimelow, 'The Short Film "Slaughterbots" Depicts a Dystopian Future of Killer Drones Swarming the World' Business Insider <https://www.businessinsider.in/the-short-film-slaughterbots-depicts-a-dystopian-future-of-killer-drones-swarming-the-world/articleshow/61732012.cms> accessed 9 March 2020.

2 ibid.

(GGE) on Lethal Autonomous Weapons Systems (LAWS) was meeting under the aegis of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons or CCW). Set up in December 2016 by the Fifth Review Conference of the High Contracting Parties to the CCW[3], the GGE has been tasked to examine "emerging technologies in the area of lethal autonomous weapons systems in the context of the objectives and purposes of the Convention".[4] The 2017, 2018 and 2019 iterations of the GGE concluded with reports, and the process is expected to continue in 2020-2021 as well.

The GGE on LAWS is attempting to address this profound problem of regulating lethal autonomous weapons but their task is not easy. This is exacerbated by the particular view that LAWS in the truly autonomous sense do not currently exist, a view shared not only by several analysts[5] but also states.[6] They argue that any attempts to regulate this technology is premature since it is almost impossible to predict how and what an actually lethal autonomous weapon would look like in the future. Indeed, *Slaughterbots* was dismissed by critics as an alarmist and exaggerated portrayal of the 'killer robot' technology that is popular in dystopian science fiction movies.[7]

But a definition of LAWS that only focuses on pure autonomy is also problematic since it effectively excludes and ignores *increasing* autonomy. Skepticism notwithstanding, it is now no longer disputed that weapons development is steadily moving towards increasing autonomy and not less. The role played by humans in using advanced weaponry has lessened to a great extent, and is set to lessen further. This is perhaps not unexpected, given that this trend is not unique to just weapons, but of technology itself,

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3 Hayley Evans, 'Lethal Autonomous Weapons Systems at the First and Second U.N. GGE Meetings' (*Lawfare*, 9 April 2018) <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-first-and-second-un-gge-meetings> accessed 8 March 2020.

4 'Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)' (United Nations 2017) CCW/GGE.1/2017/3 1.

5 Michael Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' [2013] Harvard National Security Journal Features 6 <https://harvardnsj.org/2013/02/autonomous-weapon-systems-and-international-humanitarian-law-a-reply-to-the-critics/> accessed 9 March 2020. *See* Rebecca Crootof, The Killer Robots Are Here: Legal and Policy Implications, 36 Cardozo L Rev 1837, 1863-70 (2015).

6 'Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)' (n 5) 7.

7 Paul Scharre, 'Why You Shouldn't Fear "Slaughterbots" - IEEE Spectrum' IEEE Spectrum: Technology, Engineering, and Science News (22 December 2017) <https://spectrum.ieee.org/automaton/robotics/military-robots/why-you-shouldnt-fear-slaughterbots> accessed 10 March 2020.

generally.[8] From self-driving cars in the automotive industry to robot assisted surgery in healthcare, the adoption of increasingly sophisticated technology is being endorsed for reducing human error and increasing productivity and efficiency in almost every field.

It is not surprising that the defence and national security field are no exceptions to this trend. Additionally, the dual-use nature of artificial intelligence (AI) has been and continues to be a huge enabler.[9] Strides in autonomous navigation and data analysis can not only improve civilian navigation, but also the mobility of drones or sentry bots, for instance.[10] Machine learning and deep learning not only have the potential to improve precision in robotic surgery, but also precision in strike capability in autonomous weapons.

In any discussion on LAWS, it is important to distinguish between autonomyand automation simpliciter. While autonomous weaponry is relatively new, automation of weapons technology has long been in existence. Remote piloting is one example. In the United States, at least one in three US Air Force aircraft is remotely piloted.[11]

Automation simpliciter, like the kind described above, has a certain level of human control and is hence not the main subject of contestation. Remotely piloted drones, for instance, do not act on their own and are instead controlled by a person who takes all the cognitive decisions. But new forms of automation are resulting in increasing *autonomy* to the weapons technology, i.e., the ability to act independently without human input. These weapons can, in theory at least, select and engage targets on their own without any human intervention. In fact, a South Korean company has already reportedly developed a lethal sentry robot called the SGR-A1 Sentry Guard Robot, that can be used not only for patrolling its highly militarized border, but also has the ability to identify targets and engage in hostilities on its own without human intervention.[12] It is this kind of technology that has led to

8 Kenneth Anderson and Matthew C. Waxman, 'Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can' [2013] The Hoover Institution 33, 2.

9 See MaaikeVerbruggen, 'The Role of Civilian Innovation in the Development of Lethal Autonomous Weapon Systems' (2019) 10 Global Policy.

10 ibid.

11 Spencer Ackerman and Noah Shachtman, 'Almost 1 In 3 U.S. Warplanes is a Robot' *Wired* (1 September 2012) <https://www.wired.com/2012/01/drone-report/> accessed 10 March 2020.

12 Alexander Velez-Green, 'The Foreign Policy Essay: The South Korean Sentry—A "Killer Robot" to Prevent War' (Lawfare, 1 March 2015) <https://www.lawfareblog.com/foreign-policy-essay-south-korean-sentry%E2%80%94-killer-robot-prevent-war> accessed 10 March 2020.

calls for regulation, if not a total ban, on the development of such weapons technology.

These developments have not gone unnoticed by India. Shedding its usual reticence with issues concerning international law, India is grappling with LAWS in a big way, first chairing the 2017 GGE session through Ambassador Amandeep Gill, India's permanent representative to the Conference on Disarmament and continuing to be an active participant in the preceding and successive sessions.[13] At home, India set up a multi-stakeholder task force under the Ministry of Defence to study the strategic implications of AI for national security and defence whose terms of reference include recommendations for the use of both defensive and offensive AI in several areas including aviation, naval, land systems, cyber, as well as nuclear.[14] The NITI Aayog also recently released the National Strategy on Artificial Intelligence, setting out India's goals vis-à-vis AI capabilities and mapping the path to reach them.[15] Clearly, India has no intention of being left out of the benefits that LAWS could confer. But it also appears that, rather than participate in a LAWS rat race against nations that have vastly different technological (and indeed monetary) capabilities compared to itself, India is set on its own course to develop, incorporate and utilize LAWS technology in a manner that is in keeping with its own unique experiences as part of the global south.

This paper traces the politico-legal discussions surrounding autonomous weapons and unpacks the major legal issues plaguing scholarly and governmental debates around LAWS. The authors first lay out a typology of autonomy to better understand issues and concerns with such weapons systems. The article then examines the broad legal framework with which these weapons will be required to comply and within whose boundaries these weapons will be required to be operated. The authors proceed to trace major States' views on LAWS under the auspices of the United Nations Convention on Conventional Weapons. Finally, the authors examine Indian efforts towards increasing autonomy in defence technology and assess how best autonomous weaponry can be deployed in the Indian scenario.

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[13] Bedavyasa Mohanty, 'Amidst Calls for a Ban, India Leads the Debate on Lethal Autonomous Weapons' The Wire (18 November 2017) <https://thewire.in/external-affairs/amidst-calls-ban-india-leads-debate-lethal-autonomous-weapons> accessed 4 February 2020.

[14] Press Information Bureau, 'Raksha Mantri Inaugurates Workshop on AI in National Security and Defence' Ministry of Defence, Government of India (21 May 2018).

[15] National Strategy on Artificial Intelligence (June, 2018), <https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf>; *See also* Yogima Sharma, 'Niti Aayog Proposes Rs 7,500-Crore Plan for Artificial Intelligence Push' *The Economic Times* (20 May 2019) <https://economictimes.indiatimes.com/news/economy/policy/niti-aayog-proposes-rs-7500-crore-plan-for-artificial-intelligence-push/articleshow/69403255.cms?from=mdr> accessed 22 March 2020.

II. Definitional Constraints – Humans In, On and Out of the Loop

There is currently no agreed definition for autonomous weapons.[16] But the definition used by the Department of Defence (DoD) in the United States appears to be gaining traction. The US DoD defines an autonomous weapons system as "a weapon system that, once activated, can select and engage targets without further intervention by a human operator."[17]

To use the DoD's phrase, "intervention by a human operator" can take different forms. One form requires a human to direct the system to select a target and attack it, referred to as "human-in-the-loop".[18] For instance, fire and forget weapons that require humans to choose and zero-in on the targets before launch are "in-the-loop" systems. In the DoD Directive, these systems are referred to as "semi-autonomous systems".[19] The MQ-9 Reaper used earlier this year (at the time of writing) by the US to strike and kill *Qasem Suleimani*, a general of Iran's Islamic Revolutionary Guard Corps,[20] also falls under the "in-the-loop" category.

Another form is one in which the system selects, targets and attacks them under human oversight who can override the system's actions if needed, referred to as "human-on-the-loop".[21] The Patriot air defence system which has been in use by the United States for several years can independently target and engage missiles and is an example of "on-the-loop" systems.[22] Israel's Iron Dome which automatically targets and engages incoming missiles from Gaza, is another example. The US DoD refers to these systems as

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16 *See* Rebecca Crootof, The Killer Robots Are Here: Legal and Policy Implications, 36 Cardozo L. Rev. 1837, 1847-54 (2015). *See also* Kenneth Anderson et al., Adapting the Law of Armed Conflict to Autonomous Weapon Systems, 90 Int'l L. Stud. 386, 388-90 (2014).

17 U.S. Dep't of Def., Directive 3000.09, Autonomy In Weapon Systems 13–14 (Nov. 2, 2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf> [hereinafter Dod Directive 3000.09].

18 Bonnie Docherty, '*Losing Humanity: The Case against Killer Robots*' (Human Rights Watch 2012) 2.

19 U.S. Dep't of Def., Directive 3000.09, Autonomy In Weapon Systems 14 (Nov. 2, 2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf> [hereinafter Dod Directive 3000.09].

20 Peter Baker and others, 'Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War' *The New York Times* (11 January 2020) <https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html> accessed 11 April 2020.

21 Docherty (n 19) 2.

22 Patriot Missile Long-Range Air-Defence System, US Army (Army Technology) <https://www.army-technology.com/projects/patriot/> accessed 11 April 2020.

"human-supervised autonomous systems".[23] They are considered a type of autonomous weapons system, as opposed to semi-autonomous systems.

A fully autonomous weapon or a human-out-of-the-loop weapon i.e., one that can select and engage targets without any further control by humans such as the one described by the US DoD is not yet in existence. To quote *Schmitt*, these weapons have not yet "left the drawing board".[24]

III. The Legal Framework for Lethal Autonomous Weapons

Despite LAWS being a relatively new development, inter-governmental discussions on LAWS are not taking place in vacuum. The International Court of Justice (ICJ) in its 1996Advisory Opinion on the Legality and Threat or Use of Nuclear Weapons was clear, thatinternational humanitarian law "*[p]ermeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.*"[25]

States have also expressed little disagreement with this view, with the GGE on LAWS achieving consensus that the development and use of LAWS should be governed by the rules posited in international humanitarian law or the law of armed conflict.[26] This is unlike other efforts such as the Group of Governmental Experts on Development of Information and Communication Technology in Cyberspace, for instance, which managed to agree on the applicability of international law to cyberspace only as recently as 2013.[27] Despite this being reaffirmed in 2015[28], this consensus is still threadbare, with states continuing to heavily contest the contours of international law in cyberspace, rendering the certainty in the LAWS GGE all the more surprising.

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23 U.S. Dep't of Def., Directive 3000.09, Autonomy In Weapon Systems 13 (Nov. 2, 2012), available at http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf [hereinafter Dod Directive 3000.09].

24 Schmitt (n 6) 3.

25 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996 ("*Legality of the Threat or Use of Nuclear Weapons*"), para 86.

26 'Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)' (n 5) para 16(b).

27 'Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (2013) A/68/98 para 19.

28 'Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security' (2015) A/70/174 para 25.

Since international humanitarian law is applicable, all weapons are required to be capable of being used and also be used in accordance with its rules.[29] Under these rules, weapons can either be unlawful *per se* or can be *used* in an unlawful manner. The two rules under which weapons can be *per se* unlawful are -

(a) Means or methods of warfare that cause superfluous injury or unnecessary suffering are prohibited.[30]

(b) Weapons that are by nature indiscriminate, i.e., weapons that cannot be targeted at a specific military objective, are prohibited.[31]

The first rule is the reason why blinding lasers that cause permanent blindness are banned *per se*,since they are perceived to cause 'superfluous injury', which means that they cause suffering without any military purpose.[32] Other examples include weapons that have the effect of injuring through non-detectable fragments which ordinarily cannot be detected using X-rays and hence, cannot be treated and cause suffering.[33] The ICJ has also noted that this prohibition ensures that "States do not have unlimited freedom of choice of means in the weapons they use"[34], as well as declared the rule as one of the "cardinal principles contained in the texts constituting the fabric of international humanitarian law"[35].

The second rule covers anti-personnel mines, for instance, which obviously do not discriminate between combatants and civilians. These mines can also remain active for a long time even after the end of the conflict, and endanger civilians.[36] Although the ban on mines is imposed under a separate convention, that is, the Anti-Personnel Mines Convention, the source of the underlying principle is the same.

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29 Neil Davison, 'A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law' (International Committee of the Red Cross) UNODA Occasional Papers No 30 7 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwiZ7tKcgLDoAhULbisKHVyiAxkQFjACegQIBRAB&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F65762%2Fautonomous_weapon_systems_under_international_humanitarian_law.pdf&usg=AOvVaw3Yo2nsxEEsyDwKBvi9K07G> accessed 23 March 2020.

30 Art 35(2), Additional Protocol II.

31 Art 51(4), Additional Protocol I.

32 Schmitt (n 6) 9.

33 Protocol on Non-Detectable Fragments (Protocol II), Annexed to Convention on Certain Conventional Weapons, 185.

34 Legality of the Threat or Use of Nuclear Weapons (n 26), para 78.

35 ibid.

36 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004) 68.

Weapons that are not themselves rendered unlawful by the rule against causing superfluous injury and the prohibition on indiscriminate weapons, can still be *used* unlawfully, if used in violation of certain principles - the principles of distinction, proportionality and precautions in attack.[37]

The principle of distinction requires distinguishing between the civilian population and the combatants as well as between civilian objects and military objectives and ensuring action only against military objectives.[38] The principle of proportionality refers to the rule that legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack.[39] While it cannot be identified from any one rule, it can be gathered from several provisions in Additional Protocol I to the Geneva Conventions of 1949.[40] The principle of precautions in attack refers to the obligation upon those who plan or decide upon an attack to take certain active precautions including verification to ensure the objectives are military, choosing means and methods to minimize incidental civilian injury and refraining from launching an attack that would be in breach of the principle of proportionality.[41] These principles place obligations upon combatants, who will also be liable for violations thereof.[42]

Separately, Article 36 of the Additional Protocol I mandates a legal review of all new weapons, means and methods of warfare to determine whether their employment would in some or all circumstances be prohibited by any rule in international law.[43] This provision has particular significance vis-à-vis autonomous weapons, since it requires countries to assess whether the use of a projected weapon could breach international humanitarian law.

According to *Dinstein*, it is those weapons whose "normal or expected use" would violate IHL prohibitions that would be *per se* unlawful[44], as opposed to regular weaponry that could potentially be used in breach of any of the precautionary, distinctive or proportionality principles.

Lastly, the Martens Clause, which requires that in cases not covered by existing treaties, civilians and combatants remain protected by customary

37 Davison (n 30) 7.
38 Art 48, Additional Protocol I.
39 Legality of Threat or Use of Nuclear Weapons (n 26), p. 587.
40 ibid.
41 Dinstein (n 37) 125.
42 Davison (n 30) 7.
43 Art 36, Additional Protocol I to the Geneva Conventions, 1977.
44 Dinstein (n 37) 80.

IHL, the principles of humanity, and the dictates of the public conscience[45], is also considered a yardstick to evaluate autonomous weapons.

IV. To Ban or Not to Ban? Some Legal Considerations

Autonomous weapons are a subject of major controversy, leaving states as well as experts sharply divided. As of November 2018, 28 states have called for a ban on fully autonomous weapons,[46] while several of the developed states, including Russia, United Kingdom and the United States are in opposition to any pre-emptive ban[47]. Leading the charge against LAWS, Human Rights Watch (HRW) and Harvard Law School's International Human Rights Clinic in 2012 issued a seminal report titled "Losing Humanity- The Case Against Killer Robots", in which they have articulated their arguments for a pre-emptive ban.

On the other hand, there are those who feel that a pre-emptive ban is premature, among whom *Michael Schmitt*, a professor at the US Naval War College, figures prominently.[48] In a detailed rebuttal to *Losing Humanity*, Schmitt has responded to HRW's arguments and has laid out the case for why LAWS, like other weapons, can confirm to international humanitarian law. Despite the flux of time, these two opposing views still embody the main cases for and against LAWS and are discussed below. It is important to bear in mind that this discussion pertains to *fully* autonomous weapons which are still only a futuristic prospect, and not increasingly autonomous or automated weapons.

In *Losing Humanity*, HRW lays the charge that fully autonomous weapons are *per se* illegal since they would be incapable of "abiding by the key principles of international humanitarian law"[49], which according to the report, consist of the principles of (a) distinction, (b) proportionality, (c) military necessity and (d) the Martens Clause. For his part, *Schmitt* has argued that this is not the case.

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[45] Preamble to the 1907 Hague Convention IV; art 63, Geneva Convention I; art 1(2), Additional Protocol I; Preamble to Additional Protocol II.

[46] 'Country Views on Killer Robots' (Campaign to Stop Killer Robots 2018).

[47] Damien Gayle, 'UK, US and Russia among Those Opposing Killer Robot Ban' *The Guardian* (29 March 2019) <https://www.theguardian.com/science/2019/mar/29/uk-us-russia-opposing-killer-robot-ban-un-ai> accessed 5 April 2020.

[48] Schmitt (n 6); Anderson and Waxman (n 9); Rebecca Crootof, 'The Killer Robots Are Here: Legal And Policy Implications' 36 Cardozo Law Review 79.

[49] Docherty (n 19) 30.

A. Distinction

Firstly, HRW argues that fully autonomous weapons would not be able to conform to the principle of distinction, i.e., they would not have the ability to sense or interpret the difference between soldiers and harmless civilians, especially in contemporary combat environments,[50] thereby being *per se* illegal. It gives the example of human soldiers being capable of recognizing children with toy guns enabling them to refrain from attack, as opposed to a robot which would only be able to sense two armed individuals and may very well proceed to eliminate them.[51]

To this, *Schmitt* argues that even fully autonomous weapons that are completely incapable of distinguishing between combatants and civilians are not *per se* unlawful, since they can be deployed in purely military battlespaces in which civilian presence is highly unlikely, such as naval warships, or remote parts of a desert.[52] This argument is similar to the one made in defence of the legality of nuclear weapons before the ICJ by the United Kingdom during the hearings leading up to the ICJ's Advisory Opinion.[53] In that case, the United Kingdom had also argued that it was incorrect to argue that nuclear weapons can *per se* be illegal on account of the principle of distinction since it could be used in areas where civilians are completely absent or have a high likelihood of absence.[54] The fact that the ICJ was ultimately unable to rule that nuclear weapons were illegal, preferring instead to rule that it simply could not rule either way, is telling.

Schmitt also argues that military technology is advancing and that software enabling visual identification of individuals is likely to be developed[55], as well as points out that enemies disguise themselves as civilians all the time and even regular human-operated machines have been thwarted by this[56]. Additionally, he questions HRW's assumption of human-operated weaponry's superiority over autonomous ones by referring to the US warship, the USS Vincennes, accidentally engaging an Iranian airliner carrying civilians in 1992, since it mistakenly believed they were about to attack the ship.[57]

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[50] ibid.
[51] ibid 32.
[52] Schmitt (n 6) 11.
[53] Para 3.70, Statement of the Government of the United Kingdom, Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly), International Court of Justice (June 1995).
[54] ibid.
[55] Schmitt (n 6) 11.
[56] ibid 12.
[57] ibid 13.

This led to the Iranian airliner being shot down, killing all 290 passengers on board.[58]

B. Proportionality

Secondly, HRW argues that full autonomy in weaponry would not allow compliance with the rule of proportionality in international humanitarian law, since it requires “human judgement”.[59] Drawing on several sources, including the US Air Force[60], HRW asserts that determining whether the expected collateral damage exceeds the anticipated military advantage is a highly subjective exercise that can only be determined on a case-to-case basis[61]. It quotes the International Criminal Tribunal for Former Yugoslavia (ICTY) which held that to determine whether an attack is proportionate, “it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack”.[62]

Taking the example of a robot dealing with enemies in a populous urban area, HRW asserts that assessments of proportionality are required to be made in constantly evolving situations with numerous, changing factors, which can never be “boiled down to a simple algorithm”.[63]

This argument also does not convince *Schmitt* who, while acknowledging that proportionality assessment is highly context related, again relies on advancing technology to rebut HRW. *Schmitt* admits that proportionality calculations require careful balancing of expected collateral damage and anticipated military advantage.[64] But then he points to existing methodologies in use for calculating expected collateral damage, such as the “collateral damage estimate methodology” (CDEM), whereby an attack force considers

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58 Michael R. Gordon, ‘U.S. Account of Downing of Iran Jet Criticized’ *The New York Times* (2 July 1992) <https://www.nytimes.com/1992/07/02/world/us-account-of-downing-of-iran-jet-criticized.html> accessed 5 April 2020.

59 Docherty (n 19) 32.

60 Air Force Judge Advocate General’s Department, “Air Force Operations and the Law: A Guide for Air and Space Forces” first edition, 2002, <http://web.law.und.edu/Class/militarylaw/web_assets/pdf/AF%20Ops%20&%20Law.pdf> (accessed April 5, 2020), p.27.

61 Docherty (n 19) 33.

62 *Prosecutor v Stanislav Gali*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY), Case No. IT-98-29-T, Judgment and Opinion, December 5, 2003, <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (accessed October 4, 2012), para. 58.

63 Docherty (n 19) 34.

64 Schmitt (n 6) 19.

"factors as the precision of a weapon, its blast effect, attack tactics, the probability of civilian presence in structures near the target, and the composition of structures to estimate the number of civilian casualties likely to be caused during an attack".[65] According to Schmitt, since such programs are themselves reliant on scientific algorithms, weapons systems that are incorporated with them should be "no less likely to generate a reliable result" as far as expected collateral damage is concerned.[66]

With regard to assessing the anticipated military advantage, *Schmitt* is less certain given the "complexity and fluidity of the modern battlespace", and acknowledges that impressive advances in military intelligence notwithstanding, it is "unlikely in the near future" that machines will be programmable to perform robust assessments of a strike's military advantage.[67] However, he still maintains that military advantage algorithms could theoretically be programmed into machines[68] and in any case, sees no reason why, pending the development of such technology, this should necessitate a pre-emptive ban on autonomous weapons. He also relies on the International Committee of the Red Cross's (ICRC) authoritative commentary which states that the proportionality test allows for a "fairly broad margin of judgement" and "must above all be a question of common sense and good faith for military commanders"[69] to conclude that neither humans nor machines are held to a standard of perfection and that the applicable standard in international humanitarian law is always a standard of reasonableness[70].

C. Military Necessity

Next, HRW believes that fully autonomous weaponry will also cause friction with the requirements of military necessity.[71] According to the ICRC, the principle of military necessity in international humanitarian law permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law.[72] HRW argues in *Losing Humanity* that the very development of LAWS

[65] ibid.
[66] Docherty (n 19) 20.
[67] Schmitt (n 6) 20.
[68] ibid.
[69] ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, <http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument> (accessed April 5, 2020), pp. 679, 682.
[70] Schmitt (n 6) 21.
[71] Docherty (n 19) 34.
[72] 'Military Necessity | How Does Law Protect in War? - Online Casebook' (*ICRC*) <https://casebook.icrc.org/glossary/military-necessity> accessed 5 April 2020.

will render them *militarily necessary*, thereby propagating their widespread use by nations.[73]

Schmitt simply argues that this would not render LAWS unlawful *per se* and in any case, the other requirements of distinction and mainly proportionality render any assessment of LAWS against military necessity superfluous.[74] *Schmitt* also criticizes HRW's understanding of military necessity as a separate principle on its own, as opposed to being "a foundational principle that undergirds the entire body of law".[75]

D. Martens Clause

Finally, HRW also argues that any usage of LAWS causes serious concerns under the Martens Clause.[76] The Martens Clause provides that in cases not covered by existing treaties, civilians and combatants remain protected by customary IHL, the principles of humanity, and the dictates of the public conscience.[77][78] The ICRC also agrees with HRW, having expressed the view that the Martens Clause is the link between ethical considerations and IHL, making it "particularly relevant to the assessment of autonomous weapon systems".[79] The ICJ in the Advisory Opinion had also observed that the Martens Clause "proved to be an effective means of addressing rapid evolution of military technology."[80]

HRW relies on a study conducted by *Ronald Arkin*, an American roboticist, the results of which indicated that the majority of the participants found it unacceptable that autonomous weapons could be used to take human lives.[81] Taking this to indicate the "dictates of the public conscience", HRW argues that there was no willingness among the public to accept the deployment of LAWS and therefore, any such use or deployment would fall foul of the Martens Clause.[82]

Schmitt's response to this is that by its own wording the Martens Clause is only applicable in cases not covered by existing treaties.[83]*Schmitt* believes

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[73] Docherty (n 19) 35.
[74] Schmitt (n 6) 22.
[75] ibid.
[76] Docherty (n 19) 35.
[77] Davison (n 30) 8.
[78] Art 1(2), Additional Protocol I.
[79] Davison (n 30) 8.
[80] Legality of the Threat or Use of Nuclear Weapons (n 26), para 78.
[81] Docherty (n 19) 36.
[82] ibid.
[83] Schmitt (n 6) 32.

that since international humanitarian law already extensively covers LAWS, there is no requirement to evaluate LAWS against the Martens Clause.[84]

E. Who won?

Losing Humanity effectively captures the major legal issues plaguing discussions of autonomous weaponry. HRW is right to warn governments and the rest of the world about the challenges inherent in LAWS that will make compliance with the tenets of the law of armed conflict difficult. *Schmitt's* response to HRW's challenges, while an excellent counter on law, is somewhat over-reliant on the promise of advancing technology and its potential to match up to human-levels of judgement and consciousness.

Scientists and technologists themselves dispute this optimism. *Noel Sharkey*, a leading roboticist who has long called for a ban on LAWS, believes it unlikely that computing machinery will meet the requisite standards in the foreseeable future and that while improvements are expected, significant change enabling reliability is also not likely.[85] *Sharkey* stated that "human-level discrimination with adequate common sense reasoning and battlefield awareness may be computationally intractable".[86] *Sharkey* also believes that while computers are better than humans at tasks such as calculating numbers, searching large data sets and simultaneously carrying out repetitive tasks, humans are better than computers at other tasks such as deliberative reasoning, reasoning inductively and exercising meaningful judgement.[87] An open letter was also issued in 2017, to the CCW by the founders of 116 leading AI and robotics companies across 26 countries, warning the CCW about the "pandora's box" that will be opened should nations proceed with LAWS development and use.[88]

But *Schmitt's* response contained some solutions as well. He is correct in stating that LAWS do not have todistinguish if only used in purely combat zones, such as naval warships at sea or remote desert locations. Other rules such as proportionality will still have to be complied with, but the fact that the technology to do so does not exist now does not mean that countries

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84 ibid.

85 Noel Sharkey, 'Speaker's Summary | Autonomous Weapons and Human Supervisory Control', *Expert Meeting* (ICRC 2014) 29.

86 Noel E. Sharkey, 'The Evitability of Autonomous Robot Warfare' (2012) 94 International Review of the Red Cross 787, 789 <https://www.cambridge.org/core/product/identifier/S1816383112000732/type/journal_article> accessed 8 April 2020.

87 Sharkey (n 86) 29.

88 Open Letter to the United Nations Convention on Certain Conventional Weapons (2017), Noel Sharkey, 'Autonomous Weapons and Human Supervisory Control', *Expert Meeting* (ICRC 2014) 29. accessed 8 April 2020.

should not try to develop it. Ultimately, *Schmitt's* argument can be boiled down to this – that autonomous weapons are by themselves not illegal under IHL and there is no requirement for a pre-emptive ban on the development of autonomous weapons right now. The authors find it difficult to disagree.

Cognizant of both sides of the argument, States have already advanced past this and introduced several nuances in the debate under the aegis of the CCW. It also appears that the concerns raised in *Losing Humanity* have not gone unheard, with several States acknowledging the necessity of human involvement in the functioning of autonomous weaponry to ensure compliance with IHL, and several having already declared that they will not be developing fully autonomous weaponry, that is, weaponry that can fully function without human involvement.

Japan, for instance, announced in its Working Paper presented to the 2019 GGE that it does not plan to develop fully autonomous weapons systems.[89] The United States has also acknowledged that it believes human-involvement is necessary.[90] This led to the introduction of the concept of *meaningful human control* over weapons systems as well as an attempt to identify mechanisms in IHL, such as those under Article 36 of Additional Protocol I to the Geneva Conventions, to permit the controlled development of LAWS that are compliant with IHL.

V. Towards a Common Understanding – The GGE on LAWS

In 2016, the Fifth Review Conference of the High Contracting Parties to the CCW decided to establish a Group of Governmental Experts (GGE) on LAWS with the goal to "explore and agree on possible recommendations on options related to emerging technologies in the area of LAWS".[91] Informal expert meetings under the aegis of the CCW were already taking place since 2014 and states formally joined the discussions in the form of the GGE starting 2017. It was subsequently reconvened in 2018 and also had a 2019 session which concluded in November 2019. The 2017 report acknowledged the applicability of international humanitarian law to all weapons systems

89 'Possible Outcome of 2019 GGE and Future Actions of International Community on LAWS - Working Paper to the Group of Governmental Experts Meeting of 2019 Submitted by Japan' (Government of Japan) 3 <https://www.mofa.go.jp/mofaj/files/000459707.pdf> accessed 9 April 2020.

90 Department of Defence Directive, 3000.09

91 Recommendations to the 2016 CCW Review Conference, submitted by the Chairperson of the Informal Meeting of Experts, 2016.

as well as recognized the importance of assessing aspects of human-machine interaction.[92]

The 2018 GGE achieved considerable progress, evolving a set of Guiding Principles applicable to LAWS.[93] These include IHL's full applicability to LAWS, the necessity of retaining human responsibility for decisions on the use of weapon systems as well as studies needing to be carried out by individual states to determine whether a weapon, means or method of warfare would be prohibited under international law.[94] The 2019 Report added one principle to this, namely, aspects of human machine interaction in the development, deployment and use of emerging technologies in the area of lethal autonomous weapons systems'.[95]

While the GGE has discussed several important aspects related to autonomous weapons throughout its sessions, most discussions centre around what the nature and level of the human-machine interaction should be, as well as how to have in-built compliance with IHL in autonomous weapons, or at least, increasingly autonomous weapons. In a way, the nature of human control as well as the legal review mechanisms under IHL have formed central themes.

A. Human Control

The idea of retaining human-control has been around at least since the informal expert meetings in 2014.[96] It seems states agree that giving *full* autonomy to weapons systems would not augur well, neither under technological wisdom as scholars such as *Sharkey* have espoused, nor under IHL. The result is that there is an "effective consensus" that human control is essential.[97] Now, encompassing terms such as human-in-the-loop and human-on-the-loop, the term "meaningful human control" and its variations such as "effective human control" have gained prominence. The ICRC has also called for meaningful human control to be maintained over weapons systems.[98]

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[92] 'Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)' (n 5) para 16(b).

[93] 'Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' (2018) CCW/GGE.1/2018/3 4.

[94] ibid.

[95] 'Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' (2019) CCW/GGE.1/2019/3 3.

[96] 'Report of the 2014 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS)' (2014) CCW/MSP/2014/3 para 35.

[97] Japan, 'Possible Outcome of 2019 Group of Governmental Experts and Future Actions of International Community on Lethal Autonomous Weapons Systems (Working Paper)' (2019) CCW/GGE.1/2019/WP.3 para 26.

[98] Davison (n 30) 11.

This was also echoed by India in its statement to the 2019 GGE on the human element in the use of lethal force, in which it affirmed that "human control must be maintained over all weapons systems" including LAWS.[99] Apart from this, India also expressly rejected full autonomy with no communication link or control since it "contradicts the basic operational tenets of decision making based on situational awareness and operational control by the commander".[100] India also stated that it believed human-in-the-loop was "ideal" but quick reaction systems may need to be governed by at least humans on the loop.[101]

Some countries have expressed different views. The United States, although agreeing that human involvement is necessary, believes that terms such as "control" may not be helpful.[102] In a working paper submitted to the 2018 GGE, the US sets out its position on human-machine interaction and why it prefers to use the term "levels of human judgement over the use of force" instead.[103] It cites its Department of Defence Directive 3000.09 which requires that autonomous and semi-autonomous weapon systems "be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."[104] "Human judgment" in this sense differs from "control" in that it involves broader human involvement in decisions about how, when, where, and why the weapon will be employed[105], whereas "control" could require a much higher level of power or restraint over the weapon.

The US argues that the key issue or human-machine interaction in emerging technologies in the area of LAWS is "ensuring that machines help effectuate the intention of commanders and the operators of weapons systems".[106] Enabling "human judgement", it believes, is a better way of achieving this than focusing on "control". The US also criticizes the emphasis on "control"

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99 'Statement by India: Further Consideration of the Human Element in the Use of Lethal Force; Aspects of Human Machine Interaction in the Development, Deployment and Use of Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' (2019).

100 ibid.

101 ibid.

102 United States, 'Human-Machine Interaction in the Development, Deployment and Use of Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (Working Paper)' (Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 2018) CCW/GGE.2/2018/WP.4 para 43.

103 ibid 2–3.

104 DoD Directive 3000.09, 4.a.

105 Kelley M. Sayler, 'Defense Primer: U.S. Policy on Lethal Autonomous Weapon Systems' [2019] Congressional Research Service 3 <https://fas.org/sgp/crs/natsec/IF11150.pdf>.

106 United States (n 103) para 1.

since how each weapons system is controlled is often specific to that weapons system and this can vary from system to system.[107]

Russia for its part has also acknowledged that human control over the operation of such systems is an "important limiting factor."[108] However, significantly, it also states that it believes specific forms and methods of human control should remain at the discretion of States.[109] Australia's view of control appears to overlap with the legal review process under Article 36 of Additional Protocol I. In its working paper, it presents a broad concept of control that "incrementally builds upon itself, embedding controls onto military processes and capability at all stages of their design, development, training and usage".[110] It appears to take a weapons system-specific approach, indicating that control will be "tailored to the specific AWS and its unique operating environment".[111] Even though this may be a useful way to operationalize control, as opposed to a broad based, one-size-fits-all "human control" concept that has to be applied to all weapons system, it is hard to see how states can avoid elaborating or fleshing out minimum principles, or redlines at the very least, for establishing human control.

B. Legal Review Mechanisms: Article 36 of Additional Protocol I

The other hotly contested issue in the GGE for LAWS is the question of carrying out legal reviews of weapons under Article 36 of Additional Protocol I. Article 36 mandates states to "determine whether [a new weapon's] employment would, in some or all circumstances, be prohibited by this protocol or by any other rule of international law applicable to the High Contracting Party".[112] This applies equally to means or methods of war as well.[113]

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107 ibid 48.

108 Russian Federation, 'Potential Opportunities and Limitations of Military Uses of Lethal Autonomous Weapons Systems (Working Paper)' (Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects) CCW/GGE.1/2019/WP.1 7.

109 ibid 7.

110 Australia, 'Australia's System of Control and Applications for Autonomous Weapon Systems (Working Paper)' (Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects) para 7.

111 ibid 9.

112 Art 36, Additional Protocol I.

113 ibid.

According to the ICRC, the lawfulness of an autonomous weapons system will depend on its specific characteristics and whether, given those characteristics, it can be employed in conformity with the rules of IHL in all circumstances in which it is intended and expected to be used.[114] Such a legal review must also necessarily consider treaty and customary prohibitions and restrictions on specific weapons, as well as the general IHL rules applicable to all weapons, means and methods of warfare.[115]

The ICRC goes on to state that "such a review entails fully understanding the weapon's capabilities and foreseeing its effects, notably through verification and testing" and that the legal review must demand a "very high level of confidence" that the autonomous weapon system would "predictably and reliably operate as intended".[116] HRW has expressed the view that "these reviews should begin in the early stages of development, address all configurations of the weapons, and consider such key principles of international humanitarian law as distinction, proportionality, and military necessity" as well as the Martens Clause.[117]

States such as Australia, New Zealand and Austria, among others, have expressed the view that rigorous compliance with the requirements of Article 36 would ensure compliance with international law.[118] However, the fact that several countries have not ratified Additional Protocol I, including India, is a significant problem with looking to Article 36 as a way of ensuring LAWS compliance with IHL. One solution to this is accepting the view offered by the ICRC[119] as well as scholars[120], that Article 36 is reflective of customary international law. Despite not having ratified Additional Protocol I, Israel[121] and United States still follow a detailed weapons review mechanism.

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114 Davison (n 30) 9.

115 ibid 10.

116 ibid.

117 Docherty (n 19) 26.

118 Ray Acheson, 'CCW Report' *Reaching Critical Will, Women's International League for Peace and Freedom* 5 <http://reachingcriticalwill.org/images/documents/Disarmament-fora/ccw/2018/gge/reports/CCWR6.9.pdf> accessed 11 April 2020.

119 ICRC, 'A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977' (Geneva: ICRC, 2006), <http://www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf> (accessed October 30, 2012), p 4.

120 Schmitt (n 6) 28.

121 Maya Yaron, Statement at the Group of Experts Meeting on Lethal Autonomous Weapons Systems: Lethal Autonomous Weapons Systems, UNOG (April 11, 2016), <www.unog.ch/80256EDD006B8954/%28httpAssets%29/A02C15B2E5B49AA1C1257F9B0029C454/$file/2016_LAWS_MX_GeneralDebate_Statements_Israel.pdf>

Another problem with relying on Article 36 is that there is no standardized procedure for such review even among states parties to Additional Protocol I. Each country adopting its own review mechanisms may not ensure a uniform development, let alone usage of LAWS. This has led to a call for national contributions in the GGE on how each state understands and carries out weapons review to try and formulate some form of 'best practices' that can be applied across the board.

The United States, Belgium, Spain, the Netherlands and the United Kingdom have all expressed keenness to collate national contributions detailing compliance under Article 36.[122] China, on the other hand, has doubted the effectiveness of review mechanisms in ensuring compliance with IHL given the complexity of automated systems and has also voiced concerns that reviews may pose a risk of legitimizing "undesirable" weapons.[123]

C. Other Issues

Several other issues were also topics of discussion in the GGE, such as the form any regulation of LAWS would take. In the 2018 GGE, Austria, Brazil and Chile proposed a mandate to negotiate a legally-binding instrument,[124] emphasizing that clarity could only be provided through a legal instrument. Despite receiving majority support including from the African Union, the Non-Aligned Movement and even China[125], this proposal was effectively blocked by the US and Russia, among others, who feel such a treaty would be premature.[126] As scholars have also noted, one strong argument for rejecting a binding treaty is the lack of an agreed definition for LAWS.[127]

Another suggestion came from Argentina, Australia and United Kingdom, who proposed continuing discussions on LAWS[128], presumably through forums such as the GGE under the CCW.

A third way was proposed by France and Germany, who called for a "political declaration" to identify areas of consensus and formulate guiding principles.[129] This approach also gained some traction, with ten other states

[122] Acheson (n 119) 5.
[123] ibid.
[124] Hayley Evans and Natalie Salmanowitz, 'Lethal Autonomous Weapons Systems: Recent Developments' (7 March 2019) <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-recent-developments> accessed 11 April 2020.
[125] Acheson (n 119) 4.
[126] Evans and Salmanowitz (n 125).
[127] Crootof (n 49) 1841.
[128] Evans and Salmanowitz (n 125).
[129] ibid.

supporting it.[130] Belgium also supported this view, stating that it did not preclude later options such as binding treaties.[131]

Several states also renewed the call for a ban, which was predictably opposed by states such as Russia and the US. Interestingly, China supports a ban, but only as far as using LAWS is concerned.[132] Given that China is developing its own LAWS[133] this is understandably viewed as a strategic move by China to buy itself time till it deems itself LAWS-capable.[134]

VI. Back Home: India And Lethal Autonomous Weapons

India has seen a renewed focus on issues pertaining to defence and national security in the last decade. The "surgical strike" on Pakistani soil in response to the *Pathankot* terrorist attack in 2016 was meant to show the world that India had no qualms about resorting to military strength should it be subjected to attacks such as the one at Uri.[135] Similarly, the *Pulwama* attack in 2019, in which a convoy transporting paramilitary personnel was blown up leaving at least 40 dead in Jammu & Kashmir, was responded to with airstrikes by the Indian Air Force deep inside Pakistan territory in Balakot.[136]

In subsequent instances, the Indian Government, speaking strongly through senior voices, has made it clear that it will not hesitate to "cross

130 ibid.

131 Acheson (n 119) 4.

132 Elsa Kania, 'China's Strategic Ambiguity and Shifting Approach to Lethal Autonomous Weapons Systems' (*Lawfare*, 17 April 2018) <https://www.lawfareblog.com/chinas-strategic-ambiguity-and-shifting-approach-lethal-autonomous-weapons-systems> accessed 11 April 2020.

133 Air Force News, 'In June, the Air Force Will Host the "Unmanned Competition" Intelligent UAV Cluster System Challenge' (WeChat Official Accounts Platform) <http://mp.weixin.qq.com/s?__biz=MzA4ODU2Mzg3Ng==&mid=2650013877&idx=1&sn=00a75aafd2f48a979d4d933d2668f4c8&chksm=8828e97ebf5f6068092fdd9a61e4a420cc75449acbacdc2b4e9d41c0fc01cc6b24f5a4feccf4#rd> accessed 11 April 2020.

134 Kania (n 133).

135 Nikhil A. Gokhale, 'The Inside Story of India's 2016 "Surgical Strikes"' *The Diplomat* (23 September 2017) <https://thediplomat.com/2017/09/the-inside-story-of-indias-2016-surgical-strikes/> accessed 10 April 2020.

136 Staff Reporter, 'Balakot: Indian Air Strikes Target Militants in Pakistan' *BBC News* (26 February 2019) <https://www.bbc.com/news/world-asia 47366718?intlink_from_url=https://www.bbc.co.uk/news/topics/cx3ezqn30pmt/india-pakistan-relations&link_location=live-reporting-story> accessed 10 April 2020.

border(s)"[137] or "take steps to disrupt"[138] operations against India. The *Doklam* standoff is another instance where foreign aggression, in this case Chinese, was met with an equally strong response from the Indian side.[139]

But despite defence and national security taking centre stage, India's military-spending is still not comparable to countries such as China, Russia and the United States. According to the Stockholm International Peace Research Institute, China has the highest increase in military spending in the past decade. It saw a rise of about 83% in China, as opposed to a mere 29% in India. In contrast, the US reduced its military spending in the past decade by about 17%, but despite this, it is still by far the largest spender in the world, spending more than twice China's own military-budget.[140] As the Parliamentary Standing Committee on Defence (2017-18) noted, even Pakistan's expenditure on defence was higher that India, at 3.3% of its GDP.[141]

Accordingly, China, Russia and the US are all ahead of India in the race to develop LAWS and associated technology. At the moment, India spends between 2-2.5% of its GDP on defence. Even if it were to ramp up this amount to 3% as recommended by the Standing Committee[142], the difference in GDP alone with the abovementioned countries would make it difficult to

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137 PTI, 'India's Armed Forces now do not Hesitate to Cross Border to Protect Country: Rajnath' [2020] *The Week* <https://www.theweek.in/news/india/2020/02/26/India-forces-now-do-not-hesitate-to-cross-border-to-protect-country-Rajnath.html> accessed 10 April 2020.

138 PTI, 'India Took Steps to Disrupt Terror Activities, will not Hesitate to do so Again: Nirmala Sitharaman' *The Economic Times* (20 October 2018) <https://economictimes.indiatimes.com/news/defence/india-took-steps-to-disrupt-terror-activities-will-not-hesitate-to-do-so-again-nirmalasitharaman/articleshow/66298569.cms?from=mdr> accessed 10 April 2020.

139 Josy Joseph, 'The Hindu Explains: From Who is Lungi Ngidi to Why U.K. Needs Minister For Loneliness, What is the Doklam Issue All About?' *The Hindu* (27 January 2018) <https://www.thehindu.com/news/national/what-is-the-doklam-issue-all-about/article22536937.ece> accessed 10 April 2020.

140 Matthew S. Schwartz, 'Global Military Expenditures are up, Driven by Top 2 Spenders — U.S. And China' (*NPR*) <https://www.npr.org/2019/04/29/718144787/global-military-expenditures-up-driven-by-top-two-spenders-u-s-and-china> accessed 10 April 2020. Matthew S. Schwartz, 'Global Military Expenditures are up, Driven by Top 2 Spenders — U.S. And China' (*NPR*) <https://www.npr.org/2019/04/29/718144787/global-military-expenditures-up-driven-by-top-two-spenders-u-s-and-china> accessed 10 April 2020.

141 Standing Committee on Defence, 'Demands For Grants (2018-19) | General Defence Budget, Border Roads Organisation, Indian Coast Guard, Military Engineer Services, Directorate General Defence Estates, Defence Public Sector Undertakings, Welfare Of Ex- Servicemen, Defence Pensions, Ex-Servicemen Contributory Health | Scheme (Demand Nos. 19 & 22)' (Sixteenth Lok Sabha) Fortieth Report para 4.

142 'Demand for Grants 2020-21 Analysis : Defence' (*PRS India*, 14 February 2020) <https://www.prsindia.org/parliamenttrack/budgets/demand-grants-2020-21-analysis-defence> accessed 10 April 2020.

close this gap. Merely increasing and diverting funds to developing and / or acquiring LAWS in a direction-less manner would be pointless.

India might be better off utilizing the funds it has to develop and utilize LAWS in ways that are more suited to it. India simply cannot afford to expend its resources taking part in a LAWS rat-race that it mostly cannot win in any case. It can, however, rationalize and tailor LAWS development to suit it in ways that are unique to its situation.

A. LAWS as a Solution for India's Border Woes

Apart from a shift in India's national security policy, the *Pathankot*, *Balakot* and *Doklam* incidents also highlight something crucial - that India's biggest security concerns remain at its borders, flanked by two more or less hostile nations.

India's borders are among the world's most militarized. The total length of India's international land border is 15,106.7 kms, in which the border with Pakistan is 3,323 kms long and the border with China is 3,488 kms long.[143] Other significant land borders include the Indo-Myanmar border which is 1,643 kms and the Indo-Bangladesh border which is 4,096.7 kms.[144] To guard these borders, India employs the world's largest border security force ("BSF") consisting of over 2.5 million personnel.[145]

However, employing huge numbers of manpower to guard long borders brings with it its own problems. Their salaries and pensions are required to be paid, which already form a significant portion of the defence budget. The Union Budget for 2020-21 saw the highest proportion of the defence budget, a whopping 30%, go towards salaries, while pensions account for 28.4%.[146] In contrast, capital outlay which typically includes expenditure on purchasing defence equipment, weaponry, aircrafts, naval ships, land, and construction of roads and bridges in border areas, only account for 23%.[147] It is obvious that revenue expenses such as salaries and pensions are causing a strain on the defence budget, with the result that capital expenditure such as modernization and procurement end up taking a backseat.

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143 'International Land Borders' <https://mha.gov.in/sites/default/files/BMIntro-1011.pdf> accessed 10 April 2020.

144 ibid.

145 Border Security Force, 'Press Brief-2016: BSF Raising Day' (30 November 2016) <http://bsf.nic.in/doc/press/pr24.pdf> accessed 10 April 2020.

146 'Demand for Grants 2020-21 Analysis : Defence' (n 143).

147 ibid.

One reason for this is India's over-reliance on personnel. The Indian army currently has the world's largest ground force.[148] China, which until recently had the largest army, has massively downsized its own forces in a strong modernization push started in 2015 and has now reportedly cut its ground forces by half.[149]

This is where India can take advantage of the force-multiplier effect of autonomous weapons.[150] They can easily supplement border patrol forces such as the BSF in surveillance and detection. Larger aircraft like the MQ-1B Predator, for instance, can track terrorists and their movement.[151] The RQ-11 Raven, a smaller, hand-launched drone originally developed for the US military, can provide patrolling troops with reconnaissance on demand.[152] A deployment of several of South Korea's SGR-A1 Sentry Guard Robots would also be immensely useful in patrolling both dangerous and long borders such as the Indo-Pakistan border. Israel has used armed ground robots to patrol its Gaza border.[153] Such robots can be programmed to always have humans in-the-loop as well, defusing any possibility of them going rogue.

Some movement in this direction is already taking place. India is already focusing on increasing automation, if not autonomy. The Comprehensive Integrated Border Management System (CIBMS) which has been described as involving "deployment of a range of state-of-the-art surveillance technologies — thermal imagers, infra-red and laser-based intruder alarms, aerostats for aerial surveillance, unattended ground sensors that can help detect intrusion bids, radars, sonar systems to secure riverine borders, fibre-optic sensors and a command and control system that shall receive data from all surveillance devices in real time."[154] Two pilot projects along the Indo-Pakistan border, the Indo-Bangladesh border as well as in Jammu are reportedly operationalized.[155] To be clear, the CIBMS is part of the BSF's modernization

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148 Snehesh Alex Philip, 'Indian Army Now World's Largest Ground Force as China Halves Strength on Modernisation Push' *The Print* (17 March 2020) <https://theprint.in/defence/indian-army-now-worlds-largest-ground-force-as-china-halves-strength-on-modernisation-push/382287/> accessed 10 April 2020.

149 ibid.

150 Trisha Ray, 'Beyond the "Lethal" in Lethal Autonomous Weapons: Applications of LAWS in Theatres of Conflict for Middle Powers' [2018] ORF Occasional Paper No. 180 26, 4–6.

151 Paul Scharre, *Army of None - Autonomous Weapons and the Future of War* (WW Norton & Company) 48.

152 ibid 49.

153 ibid 24.

154 'Union Home Minister Launches Smart Fencing on Indo-Bangladesh Border, an Effective Deterrence against Illegal Infiltration' (*Press Information Bureau, Ministry of Home Affairs, Government of India*) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1567516> accessed 11 April 2020.

155 ibid.

push in terms of *equipment* to supplement border surveillance capabilities. It should not to be mistaken for autonomous weaponry such as the South Korea's SGR-A1, which the CIBMS is as yet a far cry from.

The CIBMS would continuously collect feed and transmit to BSF personnel who would, in case of threats, intervene in the form of Quick Response Teams (QRTs) and neutralize them.[156] Although the CIBMS primarily envisages the use of detection and surveillance equipment such as sensors and satellite imagery, the use of drones and other unmanned aerial vehicles will also be considered.[157]

Proper implementation of the CIBMS involving the use of both automated and autonomous solutions would greatly alleviate India's border woes. Of course, given the current level of technology, AI and other technological solutions can only be a force-multiplier and not completely displace the foot soldier. But it would still go a long way towards reducing India's human resource problems and budgetary constraints. BSF soldiers work in harsh conditions. The Department-Related Parliamentary Standing Committee on Home Affairs has also noted and expressed its anguish that basic amenities are often not provided to the BSF jawans under a system that does not permit them to get sufficient rest on account of manpower shortages.[158] This results in ever-increasing numbers of BSF personnel, also pushing up salaries and pensions, both exacerbating the defence budget's revenue to capital ratio as well as delaying modernization efforts. Technology can off-set this somewhat.

A cautious approach to the development and use of LAWS in sync with its own unique needs would also synchronize with India's approach to civilian AI. In this regard, the NITI Aayog has recently argued for taking an approach to AI that was inclusive, sustainable and tailored to India's unique needs. Although only dealing with civilian application of AI, the discussion paper titled "National Strategy for Artificial Intelligence #AIFORALL" has identified sectors that AI growth in India should focus on - healthcare, agriculture, education, smart cities and infrastructure as well as smart mobility and transportation. The document is underpinned by a philosophy of "AI for

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[156] R.K. Arora, 'Can CIBMS Alone Secure the India's Borders?' *The Economic Times* (7 September 2018) <https://economictimes.indiatimes.com/news/defence/can-cibms-alone-secure-the-indias-borders/articleshow/65722529.cms?from=mdr> accessed 11 April 2020.

[157] Department-Related Parliamentary Standing Committee on Home Affairs, '*Border Security: Capacity Building and Institutions*' (Parliament of India (Rajya Sabha) 2017) 203 13 <http://164.100.47.5/committee_web/ReportFile/15/15/203_2017_4_11.pdf> accessed 11 April 2020.

[158] ibid 14–15.

the Greater Good" which ensures social and inclusive growth. Given India's large digital divide and social inequities, this is important.

VII. Conclusion

Autonomous weaponry, whether lethal or not, is inevitable. The authors of *Losing Humanity* are to be credited for strongly bringing to the fore several innate issues with autonomous weaponry, both in of itself as well as its use, but in a world of international law that is constantly shaped by real-politik, their arguments about its inherent illegality, while compelling from an ethical point of view, do not hold much legal merit. Of course, this also does not mean that the world is definitely heading towards a Terminator-like dystopian scenario. States will continue to be guided and constrained in their development and use of these weapons by international humanitarian law.

The difficulties in applying IHL as detailed in this paper will no doubt be hard to overcome. But this is not the first time existing law is being interpreted to accommodate new and possibly unfathomable technologies, as the International Court of Justice also noted in the famous *Advisory Opinion on Nuclear Weapons* case.

A positive development is how States are already seriously considering these issues and expressing their views. Although autonomous weaponry is already in use by States, it is employed only by a handful of them and even these States have not advanced irrevocably down the autonomy line. Hence, the law may not be too far behind technology in this field, and the legal principles that evolve from these ongoing discussions can help both inform and direct the growth of autonomous weaponry. That is the ultimate goal of the inter-governmental discussions on autonomous weaponry.

Meanwhile, arguments for and against autonomous weapons will continue to be raised even as technology reaches new levels of automation and autonomy and not all of these arguments will be purely legal. Some of the strongest arguments raised against autonomous weapons and that their advocates find themselves forced to defend are ethical, or even philosophical. Is it morally right to allow a machine to decide whether or not to kill a human being? This question gains all the more importance given views like those of *Sharkey's*, that technology will never advance to the point where a machine can feel as a human does. *Paul Scharre* takes this question out of the realm of hypotheticals and moral conjecturing into the real world to show us the stark consequences. In his book *Army of None - Autonomous Weapons and the Future of War*, he writes of his experience as a US Navy

Seal in Afghanistan and how he and his team had faced a young girl of around 6 years old who, under the pretext of herding cattle, was actually keeping a watch for the Taliban insurgents and had possibly even signalled to the Taliban of *Scharre's* team's presence in the area.[159] Scharre goes on to note in his book that while she was a lawful target under IHL, the question of shooting a child in such a situation had not even come up in his team.[160] But he wonders whether a machine would have made the same choice, or whether, based on the danger the girl presented, the machine would have chosen to eliminate her.[161] It is telling that the answer can never be in the realm of certainty.

On the other hand, advocates of autonomous weapons, unfazed by these arguments, present their own compelling reasons. A robot does not rape, they say.[162] A robot also does not pillage or succumb to fear or frenzy in the way humans in the heat of war can. They would also be correct. As one scholar noted, "only humans can be inhuman and only human beings can deliberately choose not to comply with the rules they were instructed to follow."[163] Arriving at the right answer in the face of these arguments is incredibly difficult. We have not attempted to address these issues in this paper, for reasons concerning both expertise and space constraints, since these complex issues deserve dedicated attention. But they are certainly important and merit in-depth examination.

Both cyber power and weaponization of AI are changing the face of modern warfare.[164] With regard to India's role in the larger scheme of autonomous weaponry, her active participation in the Group of Governmental Experts is heartening. But any claims of her playing a major leading role would, for the foreseeable future, be exaggerated. India is already lagging behind the United States and China, in defence expenditure and more importantly, defence modernization.

Aside from defence technology, India is currently not among the main competitors even in the AI race, unlike China which is going head to head

[159] Scharre (n 152) 21.
[160] ibid.
[161] ibid.
[162] Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (UN Human Rights Council 2013) A/HRC/23/47 para 54 <https://www.refworld.org/docid/51a747c54.html> accessed 1 June 2020.
[163] Marco Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified' (2014) 90 International Law Studies 310.
[164] Ajay Lele, 'Debating Lethal Autonomous Weapon Systems' (2019) 13 Journal of Defence Studies 66.

with the United States in terms of research and the number of publications on AI in scientific journals.[165] Defence experts have also expressed the view that there is a "void in terms of doctrines and perspective plans when it comes to exploitation of AI / robotics technologies.[166] The Defence Research and Development Organization, the government's premier agency for military research and development is also viewed as inadequate and unlikely to produce timely and meaningful results.[167] The CIBMS scheme is a step in the right direction as regards modernization for India's defence, but slow and unwieldy procurement processes hinder rapid progress.

Also, while the government is making it evident that they are conscious of these issues, efforts do not appear to be enough. The report of the Defence Ministry sanctioned Task Force which was commissioned to "study the whole gamut of issues surrounding strategic implications of AI in national security perspective, in global context" was not disclosed to the public, even though the transparency and multi-stakeholder consultation would have benefitted the government.[168]

It is also evident that given the difference in situations, India would be better off using LAWS as a force multiplier rather than seek to develop offensive capabilities that are not suited to its unique needs. Even this will require India to take several steps first, such as developing doctrinal and conceptual determinations of AI application, field trials, impact examination and so on.[169] At the same time, India would be well-advised to continue playing an active role in LAWS at international forums , since it can ensure its interests are not ignored in the development of the law around LAWS. Similar to several other global fora, the GGE on LAWS is also pervaded by inequalities and a tension between the developed countries such as the United States, the United Kingdom and Russia arguing against a ban, having the resources and the expertise to pursue advancements in autonomous weaponry, and the developing or least developed countries, who find themselves having to argue

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165 "Scimago Journal and Country Rank", <http://www.scimagojr.com/countryrank.php?category=1702&area=1700>, accessed on 17 February 2018.

166 R.S. Panwar, 'Artificial Intelligence in Military Operations: Technology, Ethics and the Indian Perspective' (*Manohar Parrikar Institute for Defence Studies and Analyses*, 31 January 2018) <https://idsa.in/idsacomments/artificial-intelligence-in-military-operations-india_rspanwar_310118> accessed 4 June 2020.

167 ibid.

168 Press Information Bureau, *AI Task Force Hands over Final Report to RM* <pib.gov.in/Pressreleaseshare.aspx?PRID=1537260> accessed 4 February 2020.

169 Narender Kumar, 'India Needs AI to Secure Itself' (*DNA*, 30 May 2018) <https://www.dnaindia.com/analysis/column-india-needs-ai-to-secure-itself-2620058> accessed 4 June 2020.

for a ban in an attempt to keep the playing field level.[170] This is something India will have to navigate.

On the whole, it seems likely that the dust around the issue of autonomous weapons is not going to settle for a while yet. This is because no matter how much the law can try and regulate its growth, discussions around their legality will continue to be at least partly in the realm of conjecture until LAWS are actually put to use and the consequences become evident. The aim of this paper is to illustrate or highlight the main legal issues in this important debate on autonomous weaponry, an essential task given the scarcity of academic opinion on the subject from Indian scholars.

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170 Trisha Ray, 'The Need for African Centrality in the Lethal Autonomous Weapons Debate | ORF' (ORF | Expert Speak, 8 April 2019) <https://www.orfonline.org/expert-speak/the-need-for-african-centrality-in-the-lethal-autonomous-weapons-debate-49695/> accessed 4 June 2020.